TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 958.

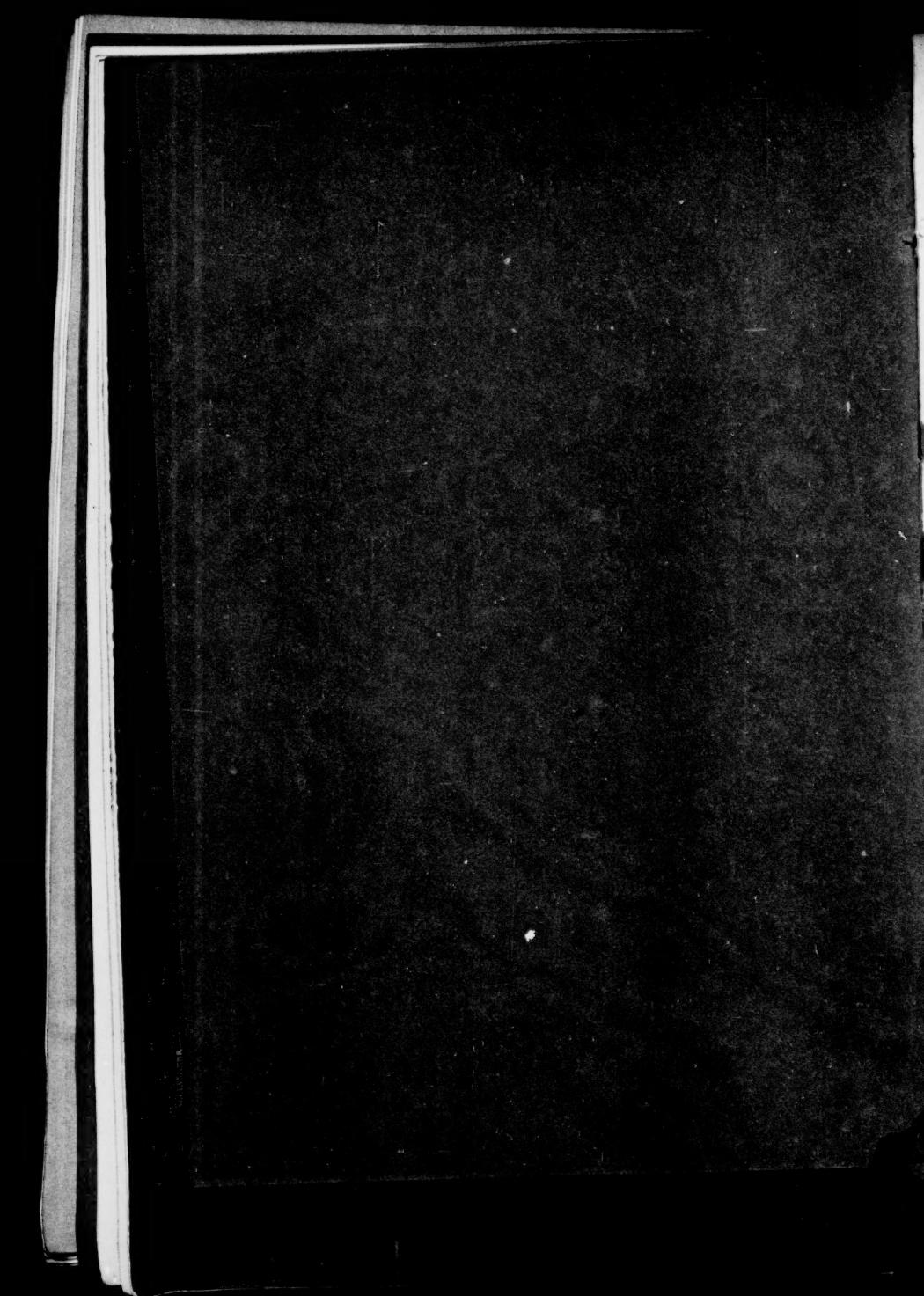
HIRAM BARNEY, PLAINTIFF IN ERROR,

vs.

THE CITY OF KEOKUK, THE KEOKUK AND DES MOINES RAILWAY COMPANY, THE SAINT LOUIS, KEOKUK AND NORTHWESTERN RAILWAY COMPANY, THE KEOKUK NORTHERN LINE PACKET COMPANY, THE TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY, AND THE TOLEDO, WABASH AND WESTERN RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED DECEMBER 21, 1876.



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3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Hiram Barney, plaintiff, and The City of Keokuk, The Keokuk & Des Moines Railway Company, The St. Louis, Keokuk & Northwestern Railway Company, The Keokuk Northern Line Packet Co., The Toledo, Peoria & Warsaw Railway Co., and The Toledo, Wabash & Western Railway Co., defendants, a manifest error hath happened, to the great damage of the said Hiram Barney, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, the 31st day of October, A. D. 1876.

[SEAL.] ED. R. MASON,
Clerk U. S. C. C., District of Iowa.

Allowed:

Judge.

(Indorsed:) Filed Oct. 31, 1876. E. R. Mason, clerk.

4 In obedience to the foregoing writ of error, I, Edward R. Mason, clerk of the circuit court of the United States for the district of Iowa, do hereby certify and return that hereto attached are full, true, and complete copies of the petition, precipe for summons, abstract of title, summons, marshal's return on same, stipulation extending time to answer, amended petition, answers of the Toledo, Peoria and Warsaw Railway Company; Toledo, Wabash and Western Railway Company; The City of Keokuk; The Keokuk and Northern Line Packet Company; The Mississippi Valley and Western Railway Company; The Keokuk and Des Moines Railway Company; amended answer of Toledo, Wabash and Western Railway Company; stipulation to waive jury; replication; finding of fact; appeal-bond, and all record entries and the judgment entry, in a certain cause wherein Hiram Barney is plaintiff and the City of Keokuk, the Keokuk and Des Moines Railway Company, the St. Louis, Keokuk and Northwestern Railway Company,
4½ the Keokuk and Northern Line Packet Company, the Toledo, Peoria & Warsaw Railway Company, the Toledo, Wabash and Western Railway Company are defendants; as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at my office, in Des Moines, in said district, this 16th day of December, A. D. 1876.

[SEAL.]

EDWARD R. MASON,
Clerk U. S. C. C., Dist. of Iowa.

5 Pleas in the circuit court of the United States of America in and for the district of Iowa, at a term thereof begun and holden at the United States court-room in the city of Des Moines and district aforesaid, on the second Monday of October, the same being the ninth day of October, A. D. 1876, before Hon. John F. Dillon, United States circuit judge for the eighth circuit, and Hon. James M. Love, United States district judge for said district of Iowa.

6 In the circuit court of the United States, district of Iowa.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK, THE KEOKUK AND DES Moines Railway Company, The Mississippi Valley and Western Railway Company, The Keokuk and St. Louis Packet Company, The Toledo, Peoria and Warsaw Railroad Company, The Toledo, Wabash and Western Railway Company, The Iowa Coal Company.

Your petitioner, Hiram Barney, a citizen of the State of New York, claims of the above-named defendants, citizens of the State of Iowa, the immediate possession of the following real estate, to wit:

All the land lying and being in front of lots five (5) and six (6)
7 in block three (3) in the city of Keokuk, Lee County, Iowa, and extending from the front line of said lots to the Mississippi River the full width of said lots.

And for cause of such claim your petitioner states that he is entitled to the possession of said premises as against each and all the defendants; that he is the owner in fee-simple of the same, subject only to the right of the public to use so much of the same as is embraced within the limits of Water street in the city of Keokuk as a public highway, and that the defendants unlawfully keep him out of possession thereof.

Your petitioner further represents that the defendant The City of Keokuk has unlawfully entered upon said premises, and, wrongfully claiming to act as proprietor or landlord thereof, has undertaken to lease portions of the same to the other defendants above named
8 for private uses and purposes, and for rent to be paid to said city therefor; and that the said city is in possession of said premises as landlord, and all the other defendants as tenants under said city of Keokuk.

And your petitioner further represents that the said defendants are indebted to him for and on account of rent for the use and occupation of said premises during the six years last past in the sum of ten thousand dollars, which is due and unpaid.

Wherefore plaintiff prays judgment for the immediate possession of said premises, and that a writ may issue according to law to put him in possession, and also for judgment for the said sum of $10,000, with interest and costs.

(Signed) J. L. RICE,
GEO. W. AND A. J. McCRARY,
W. B. COLLINS,
Attys. for Plff.

9 The clerk will issue summons, action of ejectment for possession of all the land lying in front of lots five (5) and six (6) in block three (3) in the city of Keokuk, Lee County, Iowa, and extending from the front line of said lots to the Mississippi River, the full width of said lots; and judgment for ten thousand dollars, rents and profits of same for six years.

(Signed) GEO. W. AND A. J. McCRARY,
For Plff.

(Endorsed:) Hiram Barney vs. City of Keokuk & others. Filed Nov. 10, 1874. George B. Corkhill, clerk. J. L. Rice, Geo. W. and A. J. McCrary, W. B. Collins, for plff.

10 *Abstract of title to lots 5 & 6, B. 3, Keokuk, Iowa.*

1. Lot 5, block 3, in said city, was drawn in decree of partition of half-breed lands in Lee County, Iowa, in share 92, by Marsh, Lee, and Delavan, trustees.

2. MARSH, LEE, AND DELAVAN, trustees, *to* CHARLES MASON. } June 28, '52. July 7, '52. B. 13, p. 54. Lot 5, B. 3, Keokuk. Warranty deed.

3. CHARLES MASON AND WIFE *to* JAMES L. ESTES. } Power of atty. to convey real estate in Lee County, recorded in deed-book 13, page 358.

4. CHARLES MASON & WIFE, by James L. Estes, attorney in fact, *to* HAWKINS TAYLOR. } Feb'y 1, 1856. Feb'y 6, 1856. Book 16, p. 383. N. E. ¼ of lot 5, B. 3, Keokuk. War. deed.

SHERIFF OF LEE COUNTY *to* HIRAM BARNEY. } Mch. 17, 1862. Apr. 18, 1862. B. 23, page 199.

11 N. E. ¼ lot 5, B. 3, Keokuk, sold under decree foreclosing mortgage given by Hawkins Taylor to Charles Mason, and assigned to Hiram Barney; said mortgage being of record in mortgage-book No. 5, page 205.

6. CHARLES MASON & WIFE *to* HANNAH W. MILLS. } Feb'y 20, 1856; Mch. 1, 1856; book 16, p. 478. S. ½ lot 5, block 3. Warranty deed.

SHERIFF LEE COUNTY, IOWA, *to* HIRAM BARNEY. } Mar. 17, 1862; Apr. 18, 1862; B. 23, p. 196.

Same property sold under decree of foreclosure of mortgage for purchase-money given by Hannah W. Mills to Charles Mason, and which mortgage is recorded in mortgage-book No. 5, p. 142.

Lot 6.

1. Lot 6, B. 3, city of Keokuk, Iowa, was drawn in the decree of partition of half-breed lands, in share 63, by Marsh, Lee, & Delavan, trustees.

12 2. MARSH, LEE, & DELAVAN, TRUSTEES, *to* ROSS B. HUGHES AND W. R. S. DURYEE. May 27, 1852; Jan'y 7, 1853; B. 13, p. 326. Lot 6, B. 3, Keokuk. Warranty deed.

SHERIFF LEE COUNTY, IOWA, *to* HIRAM BARNEY. Feb. 2, 1864; Feb. 12, 1864. Lot6, B. 3, Keokuk.

Sold on special execution under decree foreclosing mortgage given by Ross B. Hughes and W. R. S. Duryee to Marsh, Lee, and Delavan, for purchase-money, which mortgage is of record in book 3, page 496, mortgage-record of Lee County, Iowa, at Keokuk.

13 UNITED STATES OF AMERICA.

District of Iowa:

To the marshal of the district of Iowa:

In the name of the President of the United States, you are hereby commanded to summon The City of Keokuk, The Keokuk and Des Moines Railway Company, The Mississippi Valley and Western Railway Company, The Keokuk and St. Louis Packet Company, The Toledo, Peoria and Warsaw Railroad Company, The Toledo, Wabash and Western Railway Company, and The Iowa Coal Company, citizens of the State of Iowa, to appear before the honorable circuit court of the United States in and for the district of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Des Moines, on the second Monday of May next, it being the 10th day of May, A. D. 1875, then and there to answer unto Hiram Barney, a citizen of the State of New York, in a plea of ejectment, claiming the immediate possession
14 of all the land lying in front of lots five (5) and six (6) in block three, (3,) in the city of Keokuk, Lee County, Iowa, and extending from the front line of said lots to the Mississippi River, the full width of said lots, and for rents and profits of same for six years last past, to the damage of said plaintiff in the sum of ten thousand dollars.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at the city of Des Moines, this the 10th day of November, A. D. 1874, and of the Independence of the United States the 99th.

[L. S.] (Signed) GEORGE B. CORKHILL,
Clerk U. S. Circuit Court, District of Iowa.

15 The annexed writ came into my hands for service on the 14th day of Nov., 1874, and I served the same on the within-named City of Keokuk by reading it to Edward Yeager, mayor of said city, and giving him a copy, at Keokuk, Ia.; on the Keokuk and Des Moines Railway Company, by reading and copy to Arthur Bridgman, secretary of said company, at Keokuk, Ia.; on the Mississippi Valley and Western Railway Company, by reading it and giving copy to Guy Wells, supt. of said co., at Keokuk, Ia.; on the Keokuk and St. Louis Packet Com-

pany, by reading it and giving a copy to Matt. Archer, agent of said company, at Keokuk, Ia.; on the Toledo, Peoria and Warsaw R. R. Co., by reading it and giving a copy to Geo. W. Backus, agent of said company, at Keokuk, Ia.; on the Toledo, Wabash and Western Railway Co., by reading it and giving copy to W. H. McDoel, agent of said company, at Keokuk, Ia.; on the Iowa Coal Company, by reading it to
16 and giving a copy of it to George Williams, president of said co., at Keokuk, Ia.; all done on the 21st of Nov., 1874.

PETER MELENDY,
U. S. Marshal.
By A. BROWN,
Spec'l Deputy.

Service on 7	$14 00
7 copies	7 00
Mileage, 105	10 50
	31 50

17 This writ came into my hands for service on the 14th day of November, A. D. 1874, and I served the same on the within-named Edward Yeager, mayor of city of Keokuk; A. Bridgeman, Matt. Archer, agt. Keokuk Packet Co.; George W. Backus, agt. T., P. and W. R. R. Co.; and W. H. McDoel, agt. T., W. & W. R. R. Co.; George Williams, Iowa Coal Company; Guy Wells, supt. M. V. R. R., on the 21' day of Nov., 1874, by reading the same to each one of them and by delivering a true copy to each one of them, at Keokuk, Iowa, in the county of Lee, and State of Iowa.

(Signed) PETER MELENDY,
U. S. Marshal.
A. BROWN,
Deputy.

(Endorsed:) No. 1952. Summons. Circuit court of the United States, district of Iowa. Hiram Barney vs. City of Keokuk et al. Filed Feb'y 17, 1875. George B. Corkhill, clerk. Geo. W. and A. J. McCrary, attorneys for plff. Residence, Keokuk, Iowa.

18 HIRAM BARNEY
vs.
CITY OF KEOKUK. } U. S. C. C.

The time for defendants to plead or answer is hereby extended until Tuesday, May 17th, 1875.

And plaintiff have leave to amend, making Keokuk and Northern Line Packet Company parties, and Gillmore and Anderson hereby appear, without further service of process, and agree to answer as above.

(Signed) GILLMORE & ANDERSON,
Attys. for K. N. L. Pckt. Co., M. V. & W. R. R. Co.
GEO. W. AND A. J. MCCRARY,
For Plff.

(Endorsed:) No. 1952. Law. Barney vs. City of Keokuk et al. Agreement. Filed May 11, 1875. George B. Corkhill, clerk.

19 In circuit court U. S., district of Iowa.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK ET AL.

Now comes the said plaintiff, and, by leave of court, files this his amended petition, and avers that the Keokuk Northern Line Packet Company, a corporation and a citizen of the State of Iowa, holds possession, wrongfully and illegally, of a portion of the real estate described in the original petition: Wherefore plaintiff makes the said Keokuk Northern Line Packet Co. a party defendant herein, and makes, as against said corporation, each and all of the allegations contained in said original petition as against the defendants therein named.

And plaintiff prays judgment against said defendant as in the original petition prayed against the other defendants.

(Signed) MCCRARY AND MCCRARY,
Attys. for Plff.

20 (Endorsed:) No. 1952. Hiram Barney vs. The City of Keokuk et al. Amended petition. Filed May 11, 1875. George B. Corkhill, clerk. McCrary and McCrary, for plff.

21 United States circuit court, district of Iowa, Tuesday, May 11th 1875.

HIRAM BARNEY
vs.
CITY OF KEOKUK ET AL. } No. 1952. Law.

In this case defendant is given until 2nd Monday of this term to answer, and by leave of court, plaintiff filed amended petition.

22 In the circuit court, May term, 1875.

UNITED STATES OF AMERICA,
District of Iowa.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK, THE KEOKUK & DES Moines Valley Railway Company, The Miss. Valley and Western Railway Company, The Keokuk & St. Louis Packet Co., The Toledo, Peoria, and Warsaw Railway Company, The Toledo, Wabash and Western Railway Company, and The Iowa Coal Company. } Ejectment.

And the defendants, The Toledo, Peoria, and Warsaw Railway Company, by Ingersoll and Puterbaugh, its attorneys, comes and defends the wrong and injury, when, etc., and says that it is not guilty of
23 unlawfully withholding the tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiff has above thereof complained against it. And of this the defendant puts itself upon the country, etc.

THE TOLEDO, PEORIA, AND WARSAW R'Y CO.,
By INGERSOLL and PUTERBAUGH,
Its Attorneys.

(Endorsed:) Hiram Barney vs. City of Keokuk et al. Plea of T. P. and W. R'y Co. Filed May 11, 1875. George B. Corkhill, clerk. Ingersoll and Puterbaugh, attorneys for defendants.

In the circuit court of the United States for the district of Iowa, May term, 1875, at Des Moines.

Answer.

HIRAM BARNEY
vs.
CITY OF KEOKUK, TOLEDO, WABASH AND WESTERN RAILWAY CO. et al.

Comes now the defendant, The Toledo, Wabash and Western Railway Company, by its attorneys, Seaton and Spaan, and by way of answer to plaintiff's petition, states:

1. That it denies each and every material allegation contained in said petition, except so much thereof as is herein expressly admitted.

2. Defendant admits that it is a duly-organized railroad corporation, operating a steam-railway between the cities of Toledo, in the State of Ohio, and Keokuk, in State of Iowa, and that they occupy with
25 their track, and run their cars and engines, over and along the premises described in plaintiff's petition. That they occupy the same by virtue of a lease from the Keokuk and Des Moines Railway, and under the authority and permission of the city of Keokuk.

3rd. Defendant, further answering, states that the said track which they use and occupy is not above the grade of Water street, over which it is laid; that it is well and safely planked, and all suitable crossings provided for pedestrians and vehicles, and that offers no obstruction to the use of said highway as a public street or wharf.

4th. That the premises described in plaintiff's petition from the front line of the lots therein mentioned down to the Mississippi River, constitute a part of what is known as Water street, in said city of Keokuk; that said Water street extends the whole front as river-side of
26 said city, from the intersection of Orleans street with the Mississippi River down the right bank of said river, with the meanders thereof, to the intersection of Cedar street (on the city's side) with the Mississippi River. That said premises described in said petition are included within these limits; that the defendants' track, cars and engines, are laid upon and run over said Water street; that said Water street, including all the ground herein described, was dedicated to the city of Keokuk, as a street and public wharf.

5th. That the fee-title in and to said premises described in plaintiff's petition is in the city of Keokuk in trust for the use of the public, anp not in plaintiff, as claimed in said petition.

6th. That the fee-title of said premises in the plaintiff extended only to high-water mark at the time of the original survey, and that
27 the fee-title of said premises included between said high and low water mark on said Mississippi River is in the public, and that the public hold the fee-simple title to and have the absolute control of all accretions or deposits of earth or new-made earth filled in at the request of and by the authority of the city of Keokuk between said high and low water marks.

7th. That the use of said premises, from the front line of said lots down to low-water mark, including all accretions or new-made earth

filled in at the request of and by the authority of the city of Keokuk, is in said city in trust for the public for the use of a highway, street, or public wharf.

8th. That the defendants in this case have filed with their answer a plat or map of the premises in question, including the railways, steamboat-landings, wharf, coal-sheds, etc., etc., and that reference
28 thereto is made in this answer.

9th. Defendant denies that it is indebted to plaintiff in the sum of ten thousand dollars, or any other sum, and prays to be dismissed with its costs.

(Signed) SEATON AND SPAAN,
For Deft., T. W. and W. R. W. Co.

(Endorsed:) No. 1952. Hiram Barney vs. City of Keokuk et al. Answer of Toledo, Wabash & Western Railway. Filed May 14, 1875 George B. Corkhill, clerk. Seaton and Spaan, for defts.

29 In the circuit court of United States, district of Iowa.

Answer of the City of Keokuk.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK ET AL.

Now comes defendant, The City of Keokuk, by Craig and Collier and John Gibbons, its attorneys, and, for answer to petition of plaintiff, states:

1. That plaintiff ought not have and recover in this proceeding, for defendant states:

That it admits that plaintiff is the owner of lots 5 & 6 in block three (3) in the city of Keokuk, more particularly described, and being 100 ft. front on Water street, or the levee of the city of Keokuk, and running back paral'el with Johnston street in said city one hundred feet.

And this defendant states that all the land lying & being in front
30 of said lots as above described, and between the front line of said lots and the Mississippi River, was, on the 30th day of July, A. D. 1840, set apart and dedicated to public use as a street and levee, and that the public, ever since said date and long before said date, and down to the present, have continued to use same for a public highway and levee, and purposes therewith connected.

Wherefore this defendant states that the right to the immediate possession of said premises is in the public, & in this defendant for the public use, and not in plaintiff, and plaintiff ought not to have and recover in this action.

2. For answer to plaintiff's petition, this defendant denies all the allegations of plaintiff's petition except as hereinafter specifically admitted.

3. This defendant admits that plaintiff is the owner of lots 5 & 6, in block 3, in the city of Keokuk, but defendant denies that plaint-
31 iff is entitled to the immediate possession of the land lying in front of said lots and extending from the front line of said lots to the Mississippi River; denies that plaintiff is the owner in fee-simple of the ground in front of said lots, either as embraced within the limits of Water street, or in any other manner, lying & being in front of said lots; denies that the city of Keokuk has unlawfully entered upon said premises, and denies that said city has undertaken to lease

said premises for private uses and purposes, or for rent to be paid therefor; denies that this defendant is indebted to plaintiff in the sum of ten thousand dollars, or in any other sum, for and on account of rent for the use and occupation of said premises, as claimed in plaintiff's petition; denies that plaintiff has been damaged in said sum of ten thousand dollars, or any other sum.

32 4. For further answer to the petition of plaintiff, this defendant states that, on or about the 30th day July, A. D. 1840, the city of Keokuk was laid out and plotted by the then proprietors and owners of the land upon which said city now stands, under an act of the general assembly or legislature of the Territory of Iowa, approved A. D. 1839; that said plot was duly acknowledged and filed with the recorder of deeds of Lee County, Iowa, and that all the provisions of said act were complied with; that upon the plot so acknowledged & filed the land in controversy in this suit, or so much thereof as then lay in front of plaintiff's lots, was dedicated to public use as street and levee. Wherefore and by reason of the premises, this defendant became the owner in fee-simple of the ground herein in controversy, and became and is now entitled to the possession and control of same.

33 5. This defendant, for further answer, *this defendant for further answer* states that at the date of filing of the plot aforesaid, and for many years thereafter, the ground lying and being in front of plaintiff's lots was and continued to be a piece of land described as follows: Commencing at the easterly corner of lots 6, in block 3, thence upon a line at right angles to the front line of lots 5 & 6, in said block, to the Mississippi River, being about 100 feet; thence down the Mississippi River, following the meanders thereof, to a point upon a line dividing lots 4 & 5, in said block extended, to said river, at right angles with the front line of said lots; thence upon said extended line to the southerly corner of lot 5, in said block, about 100 feet; and thence along the front line of lots 5 & 6, 100 feet, to the place of beginning. That said ground was dedicated, as aforesaid, to public use as a street and levee, and that the city of Keokuk, in trust for the public, and by virtue

34 of its charter and ordinance, continued in the actual and peaceable possession of same, and continued to control and regulate the same as a part of the levee and wharf of said city of Keokuk, and made various improvements upon same for the purposes of adapting same to the uses and purposes of a levee & wharf, as aforesaid. And defendant further states that at various and sundry times since the 30th day of July, 1840, this defendant has at great expense deposited outside of the cold-water line and below high-water mark, in front of said lots, and upon the bed of the Mississippi River, large quantities of earth and stone, and has expended in labor and material in the work aforesaid the sum of twenty thousand dollars. That said expenditure was necessary for the public convenience, and in order to render the said wharf and levee a suitable, safe, and convenient place for boats to land and

35 discharge & take on freight and passengers, and in order to render the said wharf convenient and accessible to the public, and more especially to the citizens and inhabitants of the city of Keokuk; and defendant states that said artificial accretions extends out upon the bed of said Mississippi River a distance of about two hundred and fifty feet from and beyond the original high-water mark and water-line in front of plaintiff's lots as above described, all of which was done by the city of Keokuk with the full knowledge of plaintiff, and without any objection whatever on the part of plaintiff. And this defendant alleges that the Mississippi River is a navigable river, and that by reason of the prem-

ises plaintiff has no right, title, or interest in the artificial accretions aforesaid, and is not entitled to immediate possession of
36 *of* same or any part thereof.

6. For further answer this defendant states that for more than ten years prior to the commencement of this action, with full knowledge and without objection on part of plaintiff, this defendant, in trust and for the public, has had a quiet and peaceable possession of all the ground lying and being in front of plaintiff's lots, and between the front line of said lots and the Mississippi River, and that this defendant has held possession as aforesaid adversely to all the world, and has claimed to be and is the owner of same in fee-simple, and has claimed the use and occupancy of same for and as a levee and wharf, and has claimed and occupied the same as a street and highway for all kinds of public conveyance and private, and has claimed the right
37 to direct and control the use of same by railroad companies and others for the purpose of laying down railroad-tracks, switches, turn-outs, & side-tracks thereon, & running cars & other vehicles thereupon, & has expended large sums of money in preparing and repairing said ground for the purposes aforesaid; and that this defendant, for the purposes aforesaid, has claimed the right to so regulate and control said ground. Wherefore, and by reason of the premises, plaintiff has no right or title in & to the land in front of his said lots, and is not entitled to the possession of same.

7. Defendant further states that all the land lying and being between the front line of plaintiff's lots and the Mississippi River was, in 1840, dedicated and set apart by the then owners as a public street and highway and as public wharf & levee, and that same at the date aforesaid, and for the purposes aforesaid, was by the public accepted, and
38 that *and that* this defendant, by virtue of the power and authority vested in it by the terms of its charter, is entitled to the immediate use, control, and possession of said ground, and every part thereof, in trust for the public uses aforesaid; and defendant states same is, under the direction of this defendant, being used for the purposes for which it was so set apart and dedicated and for no other. That by reason of the premises plaintiff is not entitled to the possession of the ground herein in controversy.

8. And, for further answer to the petition of plaintiff, this defendant states that it is true, as shown by plaintiff's abstract attached to his petition, that on or about June 28th, 1852, Marsh, Lee, & Delavan, trustees, the then owners of lots in block 3, in the city of Keokuk, sold and conveyed by warrantee deed the said lot to Charles Mason.
39 That it is also true, as stated in said abstract, that the said Mason, on or about the 17th day of January, A. D. 1853, his wife, Angelica Mason, joining therein, made, executed, and delivered to one James L. Estes a certain power of atty. to convey certain real estate situated in Lee County, Iowa, and belonging to the said Mason, among which said realty was lot 5, block 3, in said city, and described in plaintiff's petition. And defendant states that on the 27th day of Sept., 1853, the said Charles Mason & wife, by their atty. in fact, James L. Estes, for a valuable consideration sold and conveyed to the city of Keokuk, by instrument of writing, a certain interest in and to the land lying and being in front of lot 5, in block 3, in the city of Keokuk, and between the front line of said lot and the middle of the Mississippi River,
40 a copy of which said conveyance is filed herewith and made part of this answer, marked "Exhibit A." That ever since the execution and delivery of the said writing, this defendant has held quiet

and peaceable possession of said premises, and was in full possession of same at the date of the purchase of said lot five by plaintiff, and by virtue of said instrument of writing defendant acquired in and to the premises therein mentioned all the rights therein specified, and has ever since the date of said conveyance continued to enjoy same. Wherefore plaintiff ought not to recover in this action.

9. This defendant states, for further answer to plaintiff's petition, that on or about the day of , A. D. 1841, the land lying and being situate between the front line of plaintiff's lots, and the then
41 high-water mark of the Mississippi River, was by the then owners dedicated to public use as a street highway & levee; that same was by the public duly accepted for the use aforesaid; that this defendant is a municipal corporation organized under special charter from the State of Iowa and in trust for the public, and by the terms of its said charter is entitled to regulate and control the use of said highway and levee in accordance with the dedication aforesaid. And defendant states that pursuant to the powers granted to it as aforesaid, this defendant had proceeded to control, use, and regulate said street and levee for public purposes, and for such purposes alone, and that this defendant is entitled to the immediate possession and occupancy of said premises. Wherefore this defendant prays to be dismissed with its cost.

42 (Signed) CRAIG AND COLLIER, AND
JOHN GIBBONS,
Attorneys for the City of Keokuk.

43 EXHIBIT A.

Filed for record July 3, 1854, at 1 o'clock a. m., and duly recorded in deed-book No. 14, page 650.

ROBT. McFARLAND,
Recorder,
By HERMAN T. STEMPLE,
Deputy.

For the consideration of one dollar I hereby relinquish to the city of Keokuk the exclusive right to establish and regulate a wharf on Water street in said city and on the land in front of it to the middle of the Mississippi River, and to fix the rates of landing and wharfage of all boats, rafts, water-crafts, floats, goods, wares, merchandise, produce, & all other articles that may be moored or landed at the same, and of charging and collecting wharfage therefor, and also forever to use and occupy for that purpose and the purpose of a public highway all that portion of Water street lying in front of lots 2 & 5, block 3, lot 5 in block 7, lot 6 in block 7 and paral'el with the middle of High street to the Mississippi River. Lot 11 in block 9, lots 3 & 4 in block 19, and paral'el with the middle of Parleau street to the Mississippi River; lots 4, 5, & 6 in block 57, and
44 paral'el with the middle of Fulton street to the Mississippi River; lots 1, 2, & 3 in block 84, and paral'el with the middle of Carrol street to the Mississippi River, and all other portions of Water street in which I have any interest, as well also as the land between said Water street and the middle of the Mississippi River. It is expressly understood that I reserve from this conveyance all that part of Water street in front of lots 5 & 6 in block 7, lying within a strai't line from the N. easterly corner of lot 6 to the N. easterly corner of lot 3 in said block 7. I also reserve all that portion of Water street lying within a strai't line from the southeasterly corner of lot 1 in block 18, the southeasterly

corner of lot 1 in block 19. I also reserve so much of Water street as lies within a line drawn from the northeasterly of lot 2 in block 56, to the northeasterly corner of lot *of lot* 5 in block 54; thence to the northeasterly corner of lot 3 in block 8. I also reserve that portion of
45 Water street lying within a line drawn from the southeasterly corner of lot 1 in block 19, to the southeasterly corner of lot 1 in block 84.

In testimony whereof, we have hereto set our names this the 27th day of September, A. D. 1853.

CHARLES MASON,
By JAS. L. ESTES,
His Atty. in Fact.
ANGELICA MASON,
By JAS. L. ESTES,
Her Atty. in Fact.

Duly acknowledged before L. E. H. Houghton.

(Endorsed:) 1952. Barney v. Keokuk et al. Filed May 18, '75. George B. Corkhill, clk. Craig and Collier. Answer of City of Keokuk.

(Here follows map marked page 46.)

47 In the circuit court of the United States, district of Iowa.

HIRAM BARNEY
vs.
CITY OF KEOKUK ET AL. } Ejectment.

Now comes the Keokuk Northern Line Packet Company, and for answer for itself and the Keokuk and St. Louis Packet Company, under whom it claims as assignee, and for answer to the petition of plaintiff, it shows:

That it denies plaintiff is entitled to the land lying & being in front of lots 5 & 6, block 3, in the city of Keokuk, extending from the front line of said lots to the Mississippi River, the full width of said lots. Denies plaintiff is entitled to the possession thereof as against the City of Keokuk, or this defendant. Denies plaintiff is the owner, in
48 fee-simple, of said land, subject to the right of the public *of the public* to use same. Denies defendant, The Keokuk Northern Line Packet Company, unlawfully kept plaintiff out of possession of the same, or any part thereof. Denies the city unlawfully took possession of same, or any part thereof. Denies that the City of Keokuk unlawfully took possession of said land and leased it to the other defendants. Denies this defendant is indebted to plaintiff in the sum of $10,000, or any part thereof for rent of said premises.

2. And for further answer this defendant denies each and every affirmative allegation in said petition contained, except as in this answer admitted.

3. And this defendant admits it occupied a portion of the
49 ground described in the petition, to wit, about fifty feet by one hundred feet, on the bank of the river below high-water mark, being located as shown by the plat of that part of the levee attached to the answer of its co-defendant, which is referred to and made part hereof. And it admits that the said portion of said levee, so occupied by this defendant, it holds and occupies under license of the City of Keokuk. And this defendant shows that said City of Keokuk, being a corporation duly organized and existing under the laws of the State of

Iowa for the government of the said city, and as such corporation having full charge and control of the streets and public grounds of said city, had full right and power to grant the right to this defendant to use and occupy the portion of the levee used and occupied by it. For it shows it is a common carrier of freight and passengers, own-
50 ing and operating a daily line of steamboats, both up and down the Mississippi River; down the river from Keokuk to St. Louis, in State of Missouri, and up said river to St. Paul, in Minnesota, and in so navigating the river it makes said city of Keokuk a landing and port for receiving and discharging at said port freight and passengers, and taking and receiving therefrom large amounts of freight, and a large number of passengers daily.

That for the accommodation of the citizens of said city of Keokuk and the public at large in receiving and shipping freight, it is necessary to have a cover or protection against the weather for the freight so shipped and received, and for the accommodation of persons so shipping and receiving freight, at said city of Keokuk; that this defendant applied to the said city of Keokuk for a license and authority to build such freight and passenger depot as was necessary to accommodate
51 their business at the city of Keokuk, which duly granted to this defendant such right, power, and authority. This defendant did construct a freight and passenger depot on the grounds aforesaid, in the place indicated to them by the city council of said city, which said building as constructed by this defendant, with roof and partly sided up, with five large doors twenty feet wide, was necessary to accommodate their business and the public, and to protect the freight and property so shipped and received at said port.

And it shows that the said five doors are kept open in day time and business-hours, and the ground so enclosed is open to the public in the day-time and in business-hours, who have free access thereto.

And this defendant shows that the said city of Keokuk is the owner in fee-simple of the said ground in front of lots 5 & 6, block 3,
52 Keokuk, described in the *in the* petition, it having been dedicated to the public for public use as a street and wharf, the title in fee-simple having been conveyed to the said city for such purpose.

And that as such street or wharf it is in the full control of the city council of the city of Keokuk, under whom, as aforesaid, this defendant has license and authority to erect and maintain its said depot.

Wherefore this defendant prays judgment dismissing said suit & for the cost herein expended.

(Signed) GILLMORE AND ANDERSON,
Attorneys for Deft.

(Endorsed:) Hiram Barney vs. The City of Keokuk et al. Filed May 18, 1875. George B. Corkhill, clerk.

53 In the circuit court of United States, district of Iowa.

HIRAM BARNEY
vs.
CITY OF KEOKUK ET AL.

Now comes the Mississippi Valley and Western Railway Company, defendant, and for answer to the petition of plaintiff it denies each and every allegation in said petition, except as herein admitted. Denies it is indebted to plaintiff in the sum of $10,000, or any other sum, for rent

of the property occupied by this defendant for a railroad-track on the levee of the city of Keokuk, Lee County, Iowa.

And for further answer this defendant shows that the city of Keokuk is the owner in fee-simple of the property, the same having been dedicated & conveyed to the city of Keokuk for a wharf and street and for public uses. That the place in said levee occupied by this defend-
54 ant for use of its tracks made ground placed in the river below high-water mark by the city of Keokuk. That this defendant occupies such portion of the levee as it has for use of its tracks under and by virtue of the authority of the city of Keokuk, given to this defendant to so construct its said track, the said city having the fee-simple title thereto.

It makes the plat filed by its codefendant, the City of Keokuk, a part hereof in full as if attached hereto, being the plot of that part of the levee embraced in plaintiff's petition.

And it shows that the use to which this defendant put such portions of the levee used and occupied by it is a public use, and for the accommodation of the public of the said city, being for use of a railroad extending from said city of Keokuk, Lee County, Iowa, to the city of Hanibal, Warren County, Missouri, and is used and maintained as a rail-
55 road by two daily trains of cars each way over said road regularly.

Wherefore defendant asks to be dismissed with costs.

G. EDMUNDS, JR., AND
GILLMORE AND ANDERSON,
For M. V. and W. Ry. Co.

(Endorsed:) Hiram Barney vs. City of Keokuk et al. Filed May 18th, 1875. George B. Corkhill, clerk.

56 In the circuit court United States, district of Iowa.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK ET AL.

Now comes defendant, The Keokuk and Des Moines Railway Company, by John Fyffe and Craig & Collier, its attorneys, and for answer to the petition of plaintiff state:

1st. That it denies each and every allegation of plaintiff's petition except as hereinafter specifically admitted.

2. This defendant admits that plaintiff is the owner of lots 5 & 6, in block 3, in the city of Keokuk, but defendant denies that plaintiff is owner of the land lying & being in front of said lots, and between the front line of said lots and the Mississippi River, or is entitled to the immediate possession of the same as against this defendant.
57 Denies that plaintiff owns said land in fee-simple or has any interest in same whatsoever. Denies that this defendant wrongfully keeps plaintiff out of possession of *of* said premises, and avers that plaintiff is not entitled the possession of said premises, or any part thereof. Denies that this defendant is indebted to plaintiff in the sum of ten thousand dollars, or any other sum. Denies that plaintiff has been damaged in the sum of ten thousand dollars, or any other sum, and denies that said sum is due plaintiff on account of rent or on any other account.

3. And for further answer to plaintiff's petition, this defendant states that it is a corporation organized under the laws of the State of Iowa, and is engaged in the operation and maintenance of a railroad between

the city of Keokuk and the city of Des Moines. That for more than ten years prior to the commencement of this suit this defendant and its grantors have continuously used, in common with the public, a part of the land lying in front of plff.'s lots as depot-grounds, and has laid
58 down thereon certain railroad tracks, switches, and turnouts, and has erected thereon & so continued a certain shed or freight-house for the convenience & accommodation of the public, and that said building has been used for the purpose of storing, loading, & discharging goods, wares, & merchandise transported or for transportation on defendant's railway.

And that for more than ten years, as aforesaid, this defendant and its grantors have, adversely to plaintiff and all the world, used a part of said premises as aforesaid, and has claimed and exercised the right so to use same in common with the public, and has claimed an easement in and upon said premises for the purposes and use aforesaid, and that said use and occupation of this defendant has been with full knowledge of plaintiff and his grantors and without objection on their part.
59 Wherefore plaintiff ought not to have and recover possession of said premises, and by reason of this defendant is entitled to the use and occupancy of same.

4. Defendant, for further answer to the petition of plaintiff, states that plaintiff ought not to have and recover possession of said premises, for defendant shows that with full knowledge of plaintiff and without objection on his part, or without claim of title or interest in said premises by plaintiff, this defendant, by and with license and authority from the city of Keokuk, Iowa, entered upon said premises and made valuable improvements thereon and expended large sums of money thereon in erecting the building as aforesaid, and in preparing the ground for the uses aforesaid, and in raising the surface of same above high-water mark of the Mississippi River, and that defendant was led to make such improvements and expenditures by the silence and acquies'ence
60 of plaintiff; wherefore plaintiff is estopped from claiming the possession of said premises as against this defendant:

5. And this defendant further states that all the land lying between the front line of plaintiff's lots and the Mississippi River was, on or about the day of , A. D. 1840, by the then owners and proprietors set apart and dedicated to public use as a street, highway, and wharf & levee, and that at the date aforesaid the same was by the public duly accepted for the said purposes, and that ever since the public has so continued to use and occupy same for the purpose aforesaid; and that the city of Keokuk, by the terms of its charter, holds said land in trust for the public as aforesaid, and is authorized to make, regulate, and control a wharf, street, and levee thereon, and has since the
61 date aforesaid been in actual possession of same, and has managed and controlled same, and that with the consent and authority of the city of Keokuk this defendant, in common with the public, has used certain portions of said ground for public purposes; that by reason of the premises plaintiff has no right to the immediate possession of said ground and ought not to recover in this action. Wherefore this defendant prays to be dismissed with its costs.

(Signed) JOHN TYFFE,
CRAIG AND COLLIER,
Attys. for K. and D. M. R'y.

(Endorsed:) Barney vs. The City of Keokuk et al. Answer of the K. & D. M. Ry. Co. Filed May 18, 1875. George B. Corkhill, clerk. John Tyffe, Craig and Collier, attorneys for K. and D. M. Ry. Co.

62 *Amended answer.*

In U. S. circuit court of Iowa, May term, 1875.

HIRAM BARNEY, PLFF.,
vs.
CITY OF KEOKUK ET AL., DEFTS.

Now comes the T., W. & W. R. R. Co., one of the defendants herein, and by leave of court files this its amended answer to the petition of plaintiff, and says:

That it reaffirms all the matters and things set forth in the answer heretofore filed, and further says that, while admitting that plaintiff is the owner of said lots in fee to the line of Water street, and owns the fee to the centre of said Water street, subject to the easements of the public, yet it denies that said plaintiff has any right, claim, or demand to the easterly portion of said street, or any claim, interest, or right in the land lying between the centre of said street and the Mississippi River, upon which defendant's track is situated. Wherefore defendant prays to be dismissed with costs.

(Signed) SEATON AND SPAAR,
For Defts. T., W. & W. R. R. Co.

63 (Endorsed:) Hiram Barney vs. The City of Keokuk et al. Amended answer of T., W. and W. R. R. Co. Filed May 19. 1875. George B. Corkhill, clerk. Seaton and Spaar, for defts.

64 *Stipulation.*

In the circuit court of the United States for the district of Iowa.

HIRAM BARNEY
vs. 1952.
THE CITY OF KEOKUK.

The parties waive a jury for the trial of this cause. The cause to be submitted to the court on written evidence at this term of court, or should the court adjourn before the evidence is completed, the same to be submitted to the circuit judge as of this term. The case to be argued in print. Plaintiff to submit his opening argument in 20 days after the close of the evidence. Defendants to submit to plaintiff's attorneys their answer in 20 days thereafter, and plaintiff to reply in 20 days. The court to find the facts and judgment to be as of this term.

(Signed) J. L. RICE.

(Signed) W. B. COLLINS,
GEO. W. AND A. J. MCCRARY,
Attys. for Plff.
GILLMORE & ANDERSON,
For Packet Company & St. Louis K. & N. Western Railway.
SEATON AND SPAAN,
Attys. T. W. & W. R. R. Co.
CRAIG & COLLIER,
Attys. City of Keokuk and Keokuk & Des Moines R. R. Co., Defts.

(Endorsed:) 1952. Filed Oct. 26, 1875. George B. Corkhill, clerk.

66 United States circuit court, district of Iowa, Monday, October 25, 1875.

HIRAM BARNEY
vs.
CITY OF KEOKUK ET AL. } No. 1952. Law.

This cause came on this day for hearing; parties appear and file following stipulation, to wit:

"The parties waive a jury for the trial of this cause, the cause to be submitted to the court on written evidence at this term of court, or, should the court adjourn before the evidence is completed, the same to be submitted to the circuit judge as of this term. The case to be argued in print: plaintiff to submit his opening argument in 20 days after the close of the evidence, defendants to submit to plaintiff's att'ys their answer in 20 days thereafter, and plaintiff to reply in 20 days. The court to find the facts and judgment to be as of this term. (Signed) J. L.
67 Rice, W. B. Collins, & Geo. W. & A. J. McCrary, attys. for plff., Seaton & Spaan, attys. for T. W. & W. R. R. Co. Gillmore and Anderson, for Packet Company & St. Louis & K. & N. Western Railway Co., Craig & Collier, attys. The City of Keokuk & Keokuk & Des Moines R. R. Co., defts."

68 In circuit court, U. S. district of Iowa.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK AND OTHERS. }

Now comes the plaintiff, Hiram Barney, and, for replication to the several answers and amended answers of the defendants herein, says he denies each and all the allegations in each and all the said answers contained in so far as they or any of them are in conflict with the original petition.

(Signed) J. L. RICE,
W. B. COLLINS,
GEO. W. AND A. J. MCCRARY,
Attys. for Plff.

(Endorsed:) 1952. Hiram Barney vs. The City of Keokuk & others. Replication. Filed Oct. 28, 1875. George B. Corkhill, clerk.

69 United States circuit court, district of Iowa. Tuesday, May 9, 1876.

HIRAM BARNEY
vs.
CITY OF KEOKUK ET AL. } No. 1952. Law.

This cause came on this day and was submitted to the court upon printed briefs to be filed, all briefs to be filed on or before June first next.

70 United States circuit court, district of Iowa. Saturday, May 20, 1876.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK. } No. 1952. Law.

It is hereby ordered by the court that the time heretofore granted to the plaintiff to reply to the various arguments of the defendants shall be extended to the first day of July, A. D. 1876.

71 United States circuit court, district of Iowa. Monday, August 18, A. D. 1876.

HIRAM BARNEY
vs.
CITY OF KEOKUK ET AL.

In view of the important and difficult questions which arise in this cause, it is ordered that it be set down for oral argument on the second day of the next term, upon the following points:

1. Is the fee of the locus in quo in the plaintiff, and herein whether there was any valid dedication of Water street, as respects the plaintiff's lots prior to the decree of partition, and particularly whether the Galland map operated as an effectual dedication, and herein as to the effect of the deeds of Marsh, Lee, and Delevan, Galland, and others, of June 14, 1837, for lots on Water street, including a lot in block 3, and
72 elsewhere in the town of Keokuk, "as per plat thereof," in connexion with the fact that Marsh, Lee, and Delevan, trustees, afterwards drew the lots now owned by the plaintiff. Is the plaintiff estopped by the facts to deny a dedication of Water street prior to the decree of partition? And counsel will furnish an abstract of title of the plaintiff's lot from the beginning.

2. If there was such prior dedication, what was the effect of it as respects the fee of the street under the statutes then in force in that regard? Herein see construction of statutes in Schemerhorn vs. St. Paul and C. R. R. Co., (10 Minn, 103 et seq.,) affirmed 7 Wall.; and what has been the construction of the statutes in this regard in Michigan, Wisconsin, Illinois, and Iowa, and the construction in Iowa is in conflict with the case in 7 Wall., which construction should be applied in this case.

73 3. If there was no effectual dedication prior to the partition decree, or *were* binding upon the plaintiff, and supposing that to leave the fee in Water street, in the adjoining lot-owners, subject to the public easement, can the legislature authorize the use of the street for railway and wharf purposes without compensation to the plaintiff, and herein what has been decided in this regard by the supreme court of the State?

4. If the right is with the plaintiff, is ejectment a proper remedy to enforce it?

The clerk will enter this of record and transmit a copy thereof to Mess. McCrary, Rice and Collins, Mess. Gillman and Anderson, Mess. Ingersoll and Peterbaugh, Mess. Seaton & Spaan, and Mess. Craig and Collins. Two counsel will be heard on each side, two hours for the plaintiff, and the same time for the defendant.

JOHN F. DILLON,
Judge.

AUG. 18TH, 1876.

74 United States circuit court, district of Iowa, Tuesday, October 10, 1876.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK ET AL. } No. 1952. Law.

In this case, an order having been made that the same be re-argued orally to the court upon certain questions set forth in said order, the same was to-day re-argued by counsel for respective parties and resubmitted to the court and by the court taken under advisement.

75 Circuit court U. S., district of Iowa.

HIRAM BARNEY
vs.
THE CITY OF KEOKUK AND OTHERS.

In this case the court finds the following facts:

1. The city of Keokuk is situated upon a tract of land lying between the Mississippi and Des Moines Rivers, in Lee County, Iowa, known as the "Half-breed Sac & Fox reservation."

2. By treaty with the Sac & Fox tribes of Indians of Aug. 4, 1824, (7th Stats. at Large 229,) and the act of Congress of June 30th, 1834, entitled "An act to relinquish the reversionary interest of the United States in a certain Indian reservation lying between the rivers Mississippi and Des Moines, (fourth Stat. at Large, p. 740,) the title of this tract was fully vested in the half-breeds of the Sac and Fox tribes
76 or nations of Indians, with full power and authority to transfer their portion thereof by sale, devise, or descent, according to the laws of the State of Missouri.

3. Numerous conveyances were made by persons belonging to said half-breeds by which many persons became interested in said tract by the purchase of undivided interest therein. Among others a corporation known as the New York Company became the owner of a large undivided interest in said tract, to wit, about $\frac{42}{100}$ thereof.

A copy of the articles of association of said New York Company is herewith filed, marked "Exhibit A," and made part of this finding.

4. That many conveyances were made by half-breeds to the trustees of the New York Company named in its articles, to wit, Joshua Aiken, Samuel Marsh, William E. Lee, Edward C. Delevan, and Isaac
77 Galland; and in 1837 Galland made conveyance so that all the title he had at the time was conveyed to the company or its trustees. That afterward certain other conveyances of half-breed interest were made personally to Galland before the decree of partition, all of which were held to be owned by the New York Company in the decree of partition.

5. That by said decree of partition no interest in said half-breed tract was awarded to said Isaac Galland individually.

6. That, in June, 1837, there was a public sale of lots in the town of Keokuk, held under the direction of one Isaac Galland, in which certain lots were sold, including two lots, being lots 1 & 2, fronting the river, in block 3; that, in pursuance of said sale, three deeds were made to purchasers, in one of which, in conveying, after describing the lots, the words "as per plot of said town" were added; that these
78 deeds were signed individually by the persons who were the trustees of the New York Company, and who, as such trustees, were afterwards adjudged to own an undivided interest in said tract entitling them to 42⅞ shares of the 101 shares into which said tract was subsequently divided, and also by other persons who were afterwards held to own, in the aggregate, undivided interest entitling them to about 20 of said shares.

7. On the 14th day of April, 1840, a suit was instituted for the partition of said half-breed tract among the several owners thereof in the district court of Lee County, Iowa Territory, in which suit Josiah Spaulding and others were plaintiffs and Euphrasia Antoya and others defendants. Said suit was brought pursuant to the provisions of an

act of the territorial legislature of Iowa, approved Jan'y 4th, 1839, entitled "An act to provide for the partition of real property."
79 (Revised Statutes of Territory of Iowa, 1843, page 458.) And all the world were parties and bound by the proceedings.

Such proceedings were had in said partition suit that afterwards, on the 7th day of October, 1841, final decree of partition was rendered upon report of commissioners appointed in that proceeding, by which said half-breed tract, including the town of Keokuk, was divided into 101 shares, and the interests of the several claimants were fixed and established.

Marsh, Lee, and Delevan, trustees of the New York Company, were declared entitled to 42⅝ of the 101 shares aforesaid, and afterwards drew that proportion and became the owners of the same in severalty.

The following portions of said decree of partition and the proceedings thereon are here copied as bearing upon the question in this case:

80 "Lot 5, block 3, was drawn in the share 93, in said decree, by Marsh, Lee & Delevan, trustees; lot 6, block 3, was drawn in share 63, in said decree, by same parties."

In drescribing each of said shares the commissioners appointed by the court say, among other things: "The lots upon Water street include all the land in front of them to the Mississippi River."

And after describing all the shares, they say:

"In describing the boundaries of the town-lots situated on Water street in the towns of Keokuk and Nashville, we have made them to include all the land in front of them to the Mississippi River, by which we mean in front of them, facing the river, parallel with the streets running from Fourteenth street to Water street."

And in describing the plat of Keokuk, the commissioners' report, among other things, says:

"Plat of Keokuk, in the county of Lee, Territory of Iowa, upon
81 the half-breed tract, the outlines of which were designated and marked by Jenefer T. Sprigg in his survey as town-reservation * * Water street is of unequal and irregular width at the points where the dotted lines pass across the same.

"The street is of the width in feet as is represented by the figures set on said lines." "Water street extends the whole front on river side of the town, or from the intersection of Orleans street with the Mississippi River, down the right bank of the river, with the meanders thereof, to the intersection of Cedar street with the Mississippi River."

"Lots five, (5,) six, (6,) of block (3) three are fifty feet wide by one hundred feet long."

The figures shown in the plat attached to the decree referred to above, as to block 3, are as follows:

(Here follows map marked page 82.)

83 7. The appointment of commissioners to make partition was as follows:

"And this court does further appoint as commissioners to make the said partition herein decreed: Sam'l B. Ayers, Harmon Booth, and Joseph Webster, with full power and authority to make the said partition into one hundred and one shares of equal value, and report the same to this court, and to do all other acts in relation thereto authorized and required by the aforesaid act, and to make return of said partition of said shares and of their proceedings, as required by said act, to

this court for confirmation, and such other and further proceedings as to the court shall seem right and according to law."

The confirmation of the report of said commissioners was as follows:

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EUPHROSINE ANTOYA ET AL.

84 Sam'l B. Ayers, Harmon Booth, and Joseph Webster, the commissioners appointed by the decree made in this cause on the 8th day of May, 1841, to make partition in the manner specified in said decree, having this day presented their report, bearing date at Ft. Madison, on the 4th day of October, 1841, whereby it appears that they have executed the duties of their appointment, and have divided the land in the proceedings in this cause into one hundred and one equal shares, excepting certain islands in the rivers Des Moines and Mississippi, which are so situated that the partition thereof cannot be made without great prejudice to the owners thereof, and have recommended that a sale of said islands be made; and on hearing William Silliman and Hugh T. Reid, of counsel for the parties in this cause, and Orville H. Browning and Milton D. Browning, of counsel for certain persons not par-
85 ties to this suit, and by consent of all the parties to this suit, and of their counsel, it is ordered, adjudged, and decreed, and the court, by virtue of the power and authority therein vested, doth order, adjudge, and decree, that said report and all and singular the matters and things therein contained be, and same are hereby, ratified and confirmed.

Lot 5, block 3, was drawn in said decree in share 92, and lot 6 in share 63, both being drawn by and confirmed to Marsh, Lee, & Delevan, trustees, &c.

In describing share 92 the decree says:

"Share 92 contains * * * in the town of Keokuk, lot five, (5,) in block three, (3.) * * * All the town-lots included in the above share are bounded by the middle of the streets and alleys upon which they are situated; and the lot upon Water street also includes all the land in front of it to the Mississippi River."

86 In describing share 63 the decree says:

"Share No. sixty-three contains * * * in the town of Keokuk, lot 6, in block 3. * * * All the town-lots included in the above share are bounded by the middle of the streets and alleys upon which they are situated; and the lots upon Water street also include all the land in front of them to the Mississippi River."

The report of the commissioners to make the partition contains the following:

"In describing the boundaries of town-lots situated on Water street in the towns of Keokuk and Nashville we have made them to include all the land in front of them to the Mississippi River, by which we mean in front of them, facing the river, parallel with the streets running from Fourteenth to Water street in the town of Keokuk," &c.

8. The town of Keokuk was mapped or platted as early as 1837,
87 but by whom the first maps were made or what has become of them does not appear in the evidence. It does appear that several maps were in existence prior to the commencement of the partition suit. The only maps or plats of Keokuk which were offered in evidence were—

1. The map which is embodied in and made part of the aforesaid

decree of partition, and which is in said decree marked "Plat of the town of Keokuk, made by order of the district court of Lee County, Iowa Territory," and referred to in the report of commissioners as the "maps or plats of said tract and town-lots accompanying this report;" and also as "plat of the town of Keokuk, in the county of Lee, Territory of Iowa," situated upon the half-breed tract, the outlines of which were designated and marked by Jennifer T. Sprig in his survey of said tract as "town reservation."

88 2. The map known as the Gallaud Map, which was not found in the office where the plats and maps of towns and cities are recorded, but in the office of the clerk of the city council of Keokuk, and on which were the following certificates:

"A plat of the town of Keokuk, situated in Lee County, Iowa Territory."

All the streets except Main and Water are 66 feet wide. Main street is 100 feet wide; Water street is of irregular and inequal width at the points where the dotted lines pass across the same street; is of the width in feet as represented by the figures set on said lines.

All streets have their name written in the same. All alleys are 20 feet wide. Lots have their numbers set in the smaller-sized figures in the same. Blocks have their numbers set in the large-sized figures in the center of the same. All lots not hereinafter enumerated as of different dimensions are 50 feet wide by 140 long.

89 All lots of blocks 1, 19, & 56, with lot 4 of block 8, lot 4 of block 55, and lot 6 of block 57, are fifty feet square; lots 1, 2, 3, 4, 5, & 6, of block 3; lots 1, 2, 3, 4, 5, 6, of block 7; lots 1, 2, 3, of block 8; lots 1, 2, 3, 4, 5, 6, of block 18; lots 1, 2, of block 20; lots 2 & 3 of block 55, are 50 feet wide by 100 feet long. All of blocks 4, 5, 6, 9, 17, 60, 102, 125, 141, 155, 172, with lots 7, 8, 9, & 10, of block 57; lots 7, 8, 9, 10, 11, & 12, of block 3; lots 7, 8, 9, 10, 11, & 12, of block 54; lot 1, of block 55; lots 7, 8, 9, 10, of block 2, are one hundred and fifty feet long by 30 feet wide.

All the streets and alleys in this town (except the alleys passing through blocks numbered 13, 20, 26, 23, 11, & 50, and Water street) are hereby declared to be and remain public highways forever. Block No. 205 is hereby granted as a public burrying-ground for the use of the citizens of said town of Keokuk.

90 In testimony whereof I have hereunto subscribed my *my* name and affixed my seal this 30th day of July, 1840.

ISAAC GALLAUD, *Trustee.* [SEAL.]
ISAAC GALLAUD, [SEAL.]
For himself and othesr proprietor.

IOWA TERRITORY,
Lee County, ss:

Personally appeared before me, an acting justice of the peace in and for the county aforesaid, Isaac Galland, the above-subscribing proprietor of the town of Keokuk, who being personally known to me to be the identical individual who subscribed the same, and acknowledged the same to be his voluntary act and deed for the uses and purposes set forth and expressed in the above references.

Given under my hand and seal this 30th day of July, 1840.

ROBT. E. MATT, [SEAL.]
Justice of the Peace.

91 In presence of—
M. ALDRICH.
JNO. W. AYERS.

I do hereby certify that this plat, with the accompanying notes, is a true survey of the town of Keokuk, situated in sec. 30, township 65 N., 4 W., and also sections 25, 26, & 36, township 65 N., 5 W., of the 5th principal meridian, in said county, Iowa Territory, July 28th, 1840.

ALANSON RIPLEY,
Dept. Surveyor of Half-Breed Reservation in Lee County.

IOWA TERRITORY,
Lee County, ss:

I, John H. Lines, county recorder in and for said county, do certify that the within plat of Keokuk was filed for record in 1840, and recorded in November following.

Witness my hand and seal this date aforesaid.

JOHN LINES,
County Recorder.

92 On the back of said map is the following:

"Presented to the city council of Keokuk, Nov. 27, 1850, by Isaac Galland."

3. A fragment or portion of a map or plat showing about half the city of Keokuk, to wit, the part of said town north of Main street, and not showing the lots in controversy. This part of a map was found in the office of the recorder of Lee County, Iowa, the proper office for recording town plats, and showed the following certificates endorsed thereon, and none other:

"A plat of the town of Keokuk, situated in Lee County, Territory. All the streets except M * * * * Water are 66 feet wide. Main street is 100 feet wide. Water street is of irregular and unequal width at the points where the * * * * pass across the
93 same; the street is of the width in feet as is represented by the figures set on said line. All alleys are 20 feet wide. All streets * * * * names written in the same. Lots have their numbers set in the smaller sized figures in the same. Blocks have their numbers set in the larger * * * * near the center of the same. All lots not hereinafter enumerated, as of different dimensions, are 50 feet wide by 140 feet long.

All lots of blo * * * * with lot 4 of block 8, lot 4 of block 55, and lot 6 of block 57, are 50 feet square. Lots 1, 2, 3, 4, 5, & 6 of block 2; lots 1, 2, 3, 4, 5, 6, of block 3; lots 1, 2, 3, 4, 5, & 6 of block 17; lots * * * of block 2; lots 7, 8, 9, 10, 11, & 12, of block 3; lots 8, 9, 10, 11, & 12, of block 7; lots 7, 8, 9, of block 18; lots 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12, of block 20; lots 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, of block 54; lot * * * * of block 55; lots 7, 8, 9, & 10, of block 57; lots 4 & 5, of block 84, are 150 feet long by 50 feet wide. Arch, Fayette, & Chatham squares are each 300 feet, or the size of one
94 entire block, and are intended for public ground. First street extends from the intersection of Morgan street with Water * * * * to the intersection of Tenica street with Water street, or 2,896 feet. Second street extends from the intersection of Franklin street with Water street * * * * , the intersection of Carrol street with Water street, or 4,626 feet. Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth streets extend northeasterly and southwesterly across the town, that is from Orleans street to Cedar street, or 5,824 feet; Water street extends across the whole front or river side of town, or from the intersection of Orleans street with the * * * *.

* * * * RITORY
of Lee, ss:

I, John H. Lines, county recorder within and for said county, do
95 hereby certify that the within town plat was filed in my office for
* * * * the 21st day of August, A. D. 1840, at 7 o'clock p. m., and duly recorded the 1st, 2nd, 3rd, 4th, 5th, & 7th days of September following, in plat-book No 1, page 7 & 8.

JOHN H. LINES,
Recorder.

☞* * * * (Where the stars are placed the map is torn or illegible.)

Lots 5 & 6, in block 3, in the city of Keokuk, were drawn in said decree by Marsh, Lee & Delavan, trustees of said New York Company. These lots front upon Water street and upon the Mississippi River. By each of the maps of Keokuk in evidence, and also in the decree of partition, the space between the front of these lots and the river was designated as Water street.

On the 27th of September, 1853, one Charles Mason was the owner of said lot 5, and had previously executed to one James L. Estes a power of attorney, a copy of which is hereby filed, marked "Exhibit B,"
96 and under said power of attorney, and with no power or authority except that conferred thereby, said Estes, on said 27th day of September, 1853, executed to the city of Keokuk a release, copy of which is hereby filed, marked "C."

Said Mason never ratified or approved of the act of said Estes in executing said release, but disapproved it as soon as informed of its execution.

10. That the city of Keokuk has, since the year 1865, caused the space originally covered by water on the river-side of Water street, in front of said lots, to be filled in with earth and stone for a space of over 200 feet beyond the original water-line to ordinary high-water mark, and about 352 feet to low-water mark, said filling having been done by the said city.

11. That part of the space between the front of said lots and the river at ordinary high-water mark is occupied as follows:

97 1. By the freight-house or depot of the defendant, The Keokuk & Des Moines Railway.

2. By the railroad-tracks used by the defendants, the Keokuk & Des Moines Railway Co., the Mississippi Valley & Western Railway Co., (now St. Louis, Keokuk and Northwestern Railway Co.,) the Toledo, Peoria & Warsaw Railway Co., and the Toledo, Wabash and Western Railway Co. Altogether there are ten railroad-tracks between the front of said lots and high-water mark.

3. By the building known as the Keokuk Northern Line Packet depot.

12. That none of the defendants so occupying said ground nor the city have caused any condemnation, nor have they asked nor obtained the permission of plaintiff, nor have they paid him any damages in compensation for their respective use of said ground. But they all and
98 severally hold the same under the license or permission of the city of Keokuk only. The map of Owen Baldwin, city engineer, (herewith filed, marked "D,") and the map attached to the answer of the city of Keokuk, taken together, constitute a substantially correct representation of said lots, and of the ground in front of them, and of the several structures thereon.

13. The defendant, Keokuk Northern Line Packet Co., as a corporation, occupies and uses a portion of the ground in front of said lots 5 & 6, block 3, near the river, for a packet depot, said company being engaged in navigating the river from St. Paul to St. Louis, using Keokuk for one of its landing places or ports. Said company occupies same under the resolution and proceedings of the city council of Keokuk, and the contract between the city and the St. Louis Packet Company hereto attached, marked "E."

99 14. The said Keokuk and Des Moines railway freight-house is a permanent and substantial frame building. It has been standing a good many years, say from about 1859, and is somewhat decayed; was rebuilt and enlarged about 1869, but is used for storing freight by said railroad company.

It is 203 feet long and 20 feet wide and one story high, and covers the whole of the front of said lots 5 & 6, B. 3.

The said packet-depot building is a permanent and substantial building 100 feet long and fifty feet wide, formed of substantial timbers, and is about 14 or 15 feet high. It was built by said Packet Co. for its own use in carrying on its business as a common carrier by steamboats on the Mississippi River, and is used by it in connection with its transportation business for the temporary storage of freight carried or to be carried by said company, and also for the business offices of said

100 company at Keokuk. Said building has five large doors through which teams are driven in delivering or receiving freight, and which doors are closed at night. The building is one and a half stories high with office rooms on second floor, and the ground-floor is of heavy two-inch lumber laid on sills about two feet apart.

15. The St. Louis, Keokuk & Northwestern Railway Company (successor to the Mississippi Valley & Western Railway Co.) occupy a portion of said ground, with their railroad-tracks, under license from the city of Keokuk, as shown by certified resolution of the city council, and contract as shown by copies of same herewith filed, marked "F," and made part hereof.

16. The said lots 5 & 6, B. 3 were drawn under the aforesaid decree of partition by Marsh, Lee & Delevan, and by regular chain of conveyances the plaintiff became the owner of said lot in fee-simple, the same being conveyed to him as lots 5 & 6, block 3, Keokuk, and was

101 such owner at the commencement of this suit, and still is.

Conclusion of law.—Under the foregoing facts the court finds, as conclusions of law, as follows:

1. There was no completed statutory dedication of Water street under the town-plat act of 1839, prior to the decree of partition, for the reason, among others, that all of the proprietors, i. e., the half-breed owners and their grantees, did not join in making a plat, or in selling lots according to the Gallaud or other plat. What was done, prior to the decree, was at most a common-law dedication by those who platted or recognized the plat, and it was therefore competent for the decree of partition to provide, as it did, "that the lots on Water street should include all the land in front of the lots to the Mississippi River."

This seems to have been the accepted view of the question.—(Milburn v. R. R. Co., 12 Iowa, 246; Haight vs. Keokuk, 4 Iowa, 199.)

102 This leaves the fee of the land constituting Water street in the plaintiff, subject to the rights of the public.

2. The additional ground made by filling in Water street outside of the original water-line partakes of the same character as the original street. The fee of the newly-made ground in front of the plaintiff's lots

is in the plaintiff, but it is subject to the same public uses as the original street. (Haight v. Keokuk, 4 Iowa, 199, 214; Wood v. San Francisco, 4 Cal., 190; New Orleans v. U. S., 10 Pet., 662.)

103 3. Under the law of Iowa, as construed by the supreme court of the State, railroad companies certainly, with the assent of the municipal authorities, have the right to lay down their tracks in the streets of a city, whether they were dedicated under the statute or as at common law; that is, whether the fee is in the city or in the adjoining proprietor.

The cases in relation to railway-tracks in common highway, where the fee is in the adjoining owner, and those relating to railways in streets in Dubuque and Burlington, where the fee is in the abutting lot-owner, establish this. (Milburn vs. Cedar Rapids, 12 Iowa, 249; Clinton vs. C. R. & M. R. R. Co., 24 Iowa, 455; Tomlin vs. D., B. &. M. R. R., 32 Iowa, 106; C., N. and S. W. R. R. Co. vs. Newton, 36 Iowa, 299; Cook vs. Burlington, 36 Iowa, 357; Clinton vs. Clinton & Lyon R. R. Co., 37 Iowa, 61; Ingraham, Kennedy and Day vs. C., D. & M. R. R. Co., 38 Iowa, 669.)

104 This court should adopt as a rule of decision on such a question the exposition of the State statutes made by the supreme court of the State. (Suydam vs. Williamson, 24 Howard, 427; Taffingwell vs. Warren, 2 Black, 599,603; Christy vs. Pudgeon, 4 Wallace, 196; Nichols vs. Leery, 5 Wallace, 433; Shipp vs. Miller Hein, 2 Wheaton, 316; Jackson vs. Chew, 12 Wheaton, 162; Swift vs. Tyson, 16 Peters, 1.)

4. This, however, does not give the railway company, even with the assent of the municipality, the right to erect a permanent and substantial depot-building in the street.

The Iowa right-of-way act of 1853 has never been thus extended by any judicial exposition of the State supreme court, nor, in our judgment, ought it to be, at least in cases where the fee is in the abutting lot-owners.

105 5. In view of the location and situation of Water street and the presumed intention of the dedication thereof to the public, and guided by the view of the supreme court of the State in this regard in Haight vs. Keokuk, supra, and the power of the city as to wharves and the use of Water street for that purpose given to the city of Keokuk by the act of the legislature of 1853, Water street may be used for levee and wharf purposes under municipal management and control.

The building erected by the packet company under the contract with the city of March 28, 1870, for the purposes therein mentioned, for the receipt and temporary shelter and storage of goods, &c., subject to municipal control, is a reasonable use of Water street as a wharf or levee as incidental to the requirements of navigation and shipping, and does not infringe the plaintiff's rights. (Ill. & St. Louis R. R. & Canal Co. vs. St. Louis, 2 Dillon, C. C. R., 70.)

106 6. We have some doubt as to the right to maintain ejectment in such a case as this, but under the practice in this State we can adjudge the right, even though we could not issue a writ of possession.

The plaintiff may take a judgment as respects the railway depot-buildings in any form he prefers.

To the second, third, and fifth conclusions of law the plaintiff at the time excepted, and to the first and fourth conclusions of law the defendants at the time excepted, and both parties pray for a bill of exceptions; which is granted. Thereupon, upon said special findings of fact, the following judgment was entered, [here insert,] to which the defendants, The Keokuk, Des Moines Railway Co. and The City of Keokuk, each ex-

cepted, and to the judgment in favor of the other defendants the plaintiff then and there excepted.

Signed this 18th day of October, 1876.

JOHN F. DILLON.
J. M. LOVE.

107 EXHIBIT A.

Exhibit A.

Articles of association of the New York Company.

This indenture made the 22nd day of October, 1836, by and between the several persons whose names and seals are hereunto subscribed, that is to say, Joshua Aikin of Peoria, and Isaac Galland, of Commerce, in the State of Illinois; Samuel Marsh, Benjamin F. Lee, William E. Lee, George P. Shipman, Henry Seymour, all of the city of New York; Edward C. Delevan and Erastus Corning, of the city of Albany. Whereas the said Joshua Aikin, Robert E. Little, and Isaac Galland, as agents, acting for and in behalf of the persons and parties hereinbefore named, have purchased certain lands situated, lying, and being in Wisconsin Territory, between the Mississippi and Des Moines Rivers, part of the tract reserved in a certain treaty made on the 4th day of August, 1824, between the United States and the Sac and Fox Nations or tribes of
108 Indians for the use of the half-breeds of said nations or tribes of Indians, amounting in the whole to the sum of twenty thousand dollars, the title to which said premises, already purchased, is at present in the name of Eli Goodwin, Benjamin F. Lee, William E. Lee, Joshua Aikin, and Isaac Galland, all parties hereto except the said Eli Goodwin; and the said Aikin and Little are authorized by the other persons and parties to these presents to invest a further sum, in their discretion, in the purchase of other portions of the same premises for and on account of the parties hereto as hereinafter defined, from time to time, as they may have opportunity, not exceeding in the whole the sum of seventy-five thousand dollars, including the above twenty thousand dollars, the title to all which premises is intended to be vested in the persons hereinafter named as joint tenants and not as tenants in com-
109 mon for the benefit of the parties hereinafter mentioned.

Now, therefore, in consideration of the premises, and in order to the more efficient, careful, and advantageous management of the said property and for the greater facility in obtaining titles and ascertaining the quantity to which, by such purchases, the parties hereto may be entitled, and also in view of dividing the said premises among and to the several persons and parties who may be entitled to portions thereof by virtue of these presents in fee-simple, as tenants in common, the said parties hereto individually, and not jointly, each for himself, his heirs, administrators, executors, and assigns, covenants and agrees to and with the others, and each of them, and to and with them and each of their heirs, executors, administrators, and assigns, respect*fully* as follows, in respect to the said property so purchased or hereinafter to be purchased, that is to say:

110 Firstly. That the title to the property already purchased shall be conveyed to and duly invested in Joshua Aikin, of Peoria, and Isaac Galland, of Commerce, in the State of Illinois, Samuel Marsh and William E. Lee, of the city of New York, and Edward C. Delevan, of the city of Albany, as joint-tenants, and not as tenants in common,

in trust for the persons and parties interested therein, as hereinafter defined; and the title to all lands hereafter purchased or acquired by the said Aikin and Little in the said district of country shall be taken in the names of the said trustees as joint tenants, and not as tenants in common, for the benefit of the parties hereto.

And it is hereby mutually agreed and understood by and between the parties hereto that the interest and right of the said parties in and to the premises already purchased, or hereafter to be purchased in
111 pursuance hereof, is as follows, that is to say: The whole into forty-eight shares or parts to be divided; the said Joshua Aikin and George P. Shipman, jointly, nineteen undivided forty-eighth parts of the whole of said premises; the said George P. Shipman, in his own right, two undivided forty-eighth parts; the said Isaac Galland, eight undivided forty-eighth parts; the said Edward C. Delevan, four undivided forty-eighth parts; the said Samuel Marsh, two undivided forty-eighth parts; the said Benjamin F. Lee, three undivided forty-eighth parts; the William E. Lee, six undivided forty-eighth parts; the said Erastus Corning, two undivided forty-eighth parts; the said Henry Seymour, two undivided forty-eighth parts.

Secondly. And the parties hereto mutually covenant and agree to and with each other, and each for himself to assume and pay on account of and for the purchase-money, expenses, and improvements
112 of said premises purchased and to be purchased, in the following shares and proportions, that is to say:

The said Isaac Galland, eight forty-eighth parts of the whole; the said Edward C. Delevan, eight forty-eighth parts; the said Samuel Marsh, four forty-eighth parts; the said Henry Seymour, four forty-eighth parts; the said B. F. Lee, four forty-eighth parts; the said William E. Lee, eight forty-eighth parts; the said Shipman and Aikin, jointly, four forty-eighth parts; the said George P. Shipman, in his own right, four forty-eighth parts; and the said Erastus Corning, four forty-eighth parts, at such time as the same shall be required to meet the drafts and notes already made, or which hereafter may be made by the said Aikin and Little, or either of them, or by any other agent or agents duly authorized on account of the premises already purchased, or hereafter to be purchased, under these presents, and for this purpose the parties hereto respect-
113 ively agree to accept and pay any draft or drafts which the said trustees, their agent or agents, or their treasurer, by them duly authorized and appointed, shall at any time make upon them or any of them for their shares or interest as aforesaid.

Thirdly. And the parties hereto mutually covenant and agree that the said trustees or a majority of them shall have power, and it shall be their duty—

1. To cause the title to said lands and property to be thoroughly examined and established in such form of proceeding as they may be advised to be proper to protect the parties in interest against any loss or question on account thereof.

2. To cause the land purchased to be surveyed so that the exact quantity of land acquired by the parties hereto by the purchases already made or hereafter to be made as herein provided shall be ascertained.

114 3. Out of the said premises they shall cause to be surveyed and laid out such sites for towns, villages, and cities as they may deem eligible and important for such purposes, of all of which sites they shall have survey and maps made, and shall furnish each of the parties to these presents with copies thereof. They shall also cause the said property to be thoroughly examined in refer-

ence to water-power and hydraulic privileges, and such points as may be designated for such purposes they shall cause to be laid out in reference thereto, and give account thereof to the parties to these presents hereafter provided.

4. And the said trustees are hereby authorized to sell and convey, from time to time, as they may find opportunity, any part of the lands so purchased on such terms as to payment, and to take such se-
115 curities for the purchase-money, or any part thereof, as they shall think fit.

5. And the trustees, or a majority of them, are also authorized to make all contracts, and do all lawful things and acts that may be necessary or proper to carry into effect the object of this agreement, and to promote the interest of the parties concerned in respect to the property purchased, and every part thereof.

6. To employ, substitute, and authorize such attorney or attorneys, agents, and clerks as may be necessary in executing the objects of this agreement, and in the care and management of the said property, and to allow them such compensation for their services as they may think fit, and in the event of the death of any of the said trustees occur'ing before the trusts hereby created are perfected, as herein provided, it is hereby mutually agreed that the surviving trustees shall
116 designate some other person to supply the place of said decedant, and the person so designated shall take the place of such decedant and execute faithfully all the duties hereby created in the same manner as such decedant, if living, might, could, and ought to have done.

Fourthly. It is hereby mutually agreed by and between the parties hereto that the purchase-money and costs of improvements, taxes, and assessments which have been paid, or which at any time hereafter shall be paid, by the said trustees, or any of them, or by any of the parties hereto, or by any other person interested in the avails of the said property, are to be charged upon the said property and repaid out of the first proceeds thereof. And the proceeds of said property already purchased, or hereafter to be purchased under this agreement, and the proceeds of improvements made and to be made thereon, or on any
117 part thereof, with all the rents, incomes, and avails thereof, howsoever arising or accruing, after paying all expenses, charges, and disbursements for such improvements, taxes, and assessments, care, and management, shall be first applied to the repayment of said purchase-money, by whomsoever paid or advanced, with interest thereon, and to the extinguishment of any sum which shall remain due and unpaid to any person or persons on account thereof. Which payments shall first be made to the persons who have paid most on the shares they are by this agreement bound to pay for till the balance of such payments shall be reduced to the same on each share, and then pro rata upon all the shares till the whole cost is repaid, so that the said premises and every part thereof may be free, clear, and unincumbered.

Fifthly. And it is mutually agreed that the said trustees shall
118 and will in good faith, to the best of their ability, so manage and dispose of every part thereof *so* as to promote the interest and advantage of all persons having a right to share in the avails and proceeds thereof, and that they shall and will, after paying all just and proper expenses for taxes, assessments, surveys, agencies, counsel-fees, and improvements as aforesaid, growing out of the proper care and management of the said property, and every part thereof, faithfully and at all times, and particularly on the first Monday of July in each and every

year hereafter, account for and pay to the parties hereto, and each of them, his or their assigns or personal representatives, the portion of the avails and proceeds of the said property which he or they may be entitled to by virtue hereof; and the said trustees shall keep a regular book of account or accounts, in which shall be entered all their
119 purchases, sales, and proceedings in respect to said property, and every part thereof, which books shall at all times be open to the inspection of any of the parties interested in the said premises. And they shall semi-annually, on the first days of January and July in each and every year, render an account of their doings to each of the parties interested, if required.

Sixthly. And it is mutually covenanted and agreed, also, that whenever the trustees shall have received or realized money enough from the sale and other disposition of the property to satisfy and pay up the whole amount of the purchase money and improvements and interest thereon, over and above the taxes, assessment, and expenses of management, the power of the said trustees to sell said property shall cease, determine, and be at an end, and they shall forthwith thereafter, and with as little delay as the nature of the business will permit, pro-
120 ceed to make partition of said premises and to lay off and divide the same in manner following, that is to say: They shall first divide the whole of said premises into two classes, viz, in the first class shall be embraced such portion of said property as may have been laid off and reserved for the sites of towns, villages, and cities, and of hydraulic privileges, and in the second class shall be embraced all the residue of the said property, and they shall thereupon divide each of the said sites of towns, villages, cities, and hydraulic privileges embraced in the first class into forty-eight parts of equal value, quantity, and quality relatively considered, and the residue of said premises embraced in the second class shall be divided into forty-eight parts of equal value, quantity and quality relatively considered, and the property thus divided and apportioned shall be distributed among the parties and per-
121 sons interested in the proportions hereinafter stated, which distribution shall be made by the said trustees for the time being, by lot, so as to secure to each his just share in each class as above specified, and sixty days' notice shall be given by the said trustees to each of the parties interested of the time and place of such distribution, and upon such division they shall forthwith, by good and sufficient deed or deeds, release and convey in fee to the several persons and parties interested, their heirs and assigns, forever, all the said residue of the said property, in the shares and proportions following, that is to say: The said Joshua Aikin and George P. Shipman, jointly, nineteen forty-eighth parts, to the said George P. Shipman in his own right, two forty-eighth parts, to the said Isaac Galland, eight forty-eighth parts, to the said
122 Edward C. Delevan, four forty-eighth parts, to the said Samuel Marsh, two forty-eigth parts, to the said Benjamin F. Lee, three forty-eighth parts, to the said William E. Lee, six forty-eighth parts, to the said Erastus Corning, two forty-eighth parts, to the said Henry Seymour, two forty-eighth parts; and the trustees shall also at the same time divide among the said parties, in the same proportion, all the money, securities for and evidences of debt which they may have on hand accruing from the said property or any part thereof.

Seventhly. It is understood that the said Aikin and Little shall not, directly or indirectly, during the continuation of these presents, make any purchase of lands in said district of country on any other account, except by the consent of the trustees, for the time being, until after the

said fund of seventy-five thousand dollars shall have been fully invested by them; and if after that they shall make any purchase of
123 the said lands, the parties hereto shall have the refusal thereof at cost, on the terms and in the proportions herein expressed.

Eighthly. The said trustees shall give to each one of the parties interested a certificate, under the hands and seals of at least two of them, one of whom shall be the president or chairman of the board of trustees, stating the interest which, by virtue of these presents, he is entitled to in the premises.

And it is expressly agreed that if any assignment be made, of any interest hereby created, the same shall be made on the said certificate, which shall thereupon be surrendered to the trustees, at their office in the city of New York, and a new certificate or certificates shall thereupon be issued therefor to the proprietor or proprietors; and no sale or transfer of any interest herein shall be obligatory upon, or operate
124 as a notice to, the said trustees of such assignment or transfer unless the above conditions be complied with, and the said parties who are designated and appointed trustees, for the objects and purposes herein expressed, do by these presents declare their assent to the said trusts hereby created.

In testimony of their assents whereunto the said parties have hereunto set their hands and seals, the day and year first above written.

EXHIBIT B.

125 Acknowledged in due form.

CHARLES MASON AND WIFE *to* JAMES L. ESTES. } Power of attorney.

Know all men by these presents that we, Charles Mason and Angelica, his wife, hereby appoint James L. Estes, of Keokuk, in the county of Lee and State of Iowa, our attorney in fact, for us and in our names to sell and convey any or all the land or lots owned by us in said county, which were conveyed to the said Charles Mason by deed executed by Samuel Marsh, William E. Lee, and Edward C. Delevan, and dated June 28th, 1852, excepting the two small fractions of land situated in township sixty-five (65) north, range four (4) west; and also excepting the fractional southeast quarter of section twenty-six, (26,) township sixty-five (65) north, range five (5) west; and we also authorize him to execute in our names deeds of conveyance for the lands or lots he
126 shall so sell, containing a covenant of full warrants on the part of the said Charles Mason.

In testimony whereof we have hereunto subscribed our names this 17th day of January, 1853.

CHARLES MASON.
ANGELICA MASON.

EXHIBIT C.

(Book 14, page 650.)

CHARLES MASON AND WIFE *to* CITY OF KEOKUK. } Relinquishment.

For the consideration of one dollar I hereby relinquish to the City of Keokuk the exclusive right to establish and regulate a wharf on Water street, in said city, and on the land in front of it, to the middle

of the Mississippi River, and to fix the rates of landing and wharfage of all boats, rafts, water-crafts, floats, goods, wares, merchandise, produce, and all other articles that may be mo'ved or landed at the same, and of charging and collecting wharfage therefor and
127 also forever to use and occupy for that purpose and the purpose of a public highway all the portion of Water street lying in front of lots 2 and 5 in bl. 3, lot 5 in bl. 7, lot 6 in bl. 7 and parallel with the middle of High street to the Mississippi River; lot 11 in bl. 9, lots 3 and 4 in bl. 19 and parallel with the middle of Paten str. to the Mississippi River; lots 4, 5, and 6 in bl. 57, and parallel with the middle of Fulton street to the Mississippi River; lots 1, 2, and 3 in bl. 84, and parallel with the middle of Carroll street to the Mississippi River, and all other portions of Water street in which I have any interest, as well also as the land between said Water street and the middle of the Mississippi. It is expressly understood that I reserve from this conveyance all that part of Water street in front of lots 5 and 6, in block 7, lying within a straight line from the N. easterly corner of lots 6 to the N. easterly corner of
128 lot 3 in said block 7. I also reserve all that portion of Water street lying within a straight line from the southeasterly corner of lot 1, inblock 18 to the southeasterly corner of lot 1 in block 19. I also reserve so much of Water street as lies within a line drawn from the northeasterly of lot 2 in block 56 to the northeasterly corner of lot 5 in block 57, thence to the northeasterly corner of lot 3 in block 8. I also reserve that portion of Water street lying within a line drawn from the southeasterly corner of lot 1 in block 19 to the southeasterly corner of lot 1 in block 84.

In testimony whereof we have hereunto set our names this the 27th day of September, A. D. 1853.

CHARLES MASON.
By JAS. L. ESTES,
His Attorney-in-fact.
ANGELICA MASON.
By JAS. L. ESTES,
Her Attorney-in-fact.

Acknowledged in due form.

129 (Endorsed:) 1952. Hiram Barney vs. City of Keokuk et al. Letter of atty. from Chas. Mason and wife to Estes. Filed June 23, 1876. E. R. Mason, clerk.

(Here follows map marked "page 130.")

131 EXHIBIT E.

STATE OF IOWA,
Lee County, City of Keokuk, ss:

Be it remembered that the following among other proceedings were had by the city council of Keokuk at the dates hereinafter shown, respectively:

COUNCIL-ROOM, *Jan. 24th*, 1870.

A petition was received from D. Mooar and 45 others, asking the city council to give the Saint Louis and Keokuk Packet Company the privilege of erecting a suitable depot or store-house on some point on the wharf between Main and Johnson streets for the storage and protection of freight.

Referred to the mayor, city engineer, and wharf committee.

COUNCIL-ROOM, *Feb.* 7, 1870.

132 The special committee, to whom was referred the petition of D. Mooar and others to grant to the Keokuk and St. Louis Packet Company the privilege of putting up a depot for the purpose of storing freight, made the following report, viz:

The committee beg leave respectfully to report adverse to the prayer of the petition.

They recommend the following arrangement in the nature of a contract to be entered into between the city and the Keokuk and St. Louis Packet Company: The packet company to make the fill from the railroad side-track to the toe of the extended levee, and from the south side of Johnson street along said track and toe to a distance of 150 feet, and to the depot proposed for the contemplated extended levee. The same to be finished and the packet company fully macadamizing the surface outside of the depot; building not to exceed 50 feet in width by 81 feet in length. The city to grant mortgages to the packet company
133 for 10 years and pay the packet company thirty cents per yard for earth-filling and $1.50 per cubic yard for macadamizing, to be paid in new wharf-bonds. The estimated amount of earth-filling, 19,000 yards; of macadamizing, 1,000 cubic yards.

Report received and made special order for next regular meeting.

COUNCIL ROOM, *February* 14, 1870.

The report of the special committee upon the proposition of the St. Louis and Keokuk Packet Company was then taken up, and Alderman Rothert moved that the same be laid on the table; motion lost. Alderman Cruty moved that the report of the committee be amended by striking out 80 and inserting 101 as the length of the building; amendment lost.

Alderman Cruty moved to amend the report so as to require the unconditional removal of the building at the expiration of ten years; amendment adopted.

134 Alderman moved to amend the report so as to require the Packet Company to put in the toe of the wharf without compensation therefor.

Amendment lost.

The report of the committee as amended was adopted by the council.

The city attorney was directed to draw up a contract between the city and the St. Louis and Keokuk Packet Company, in accordance with the report of the committee as adopted by the city council, and report the same to the council for its action thereon at its next meeting.

COUNCIL ROOM, *April 5th*, 1870.

The wharf committee reported the following:

Resolved, That the Keokuk and St. Louis Packet Company be allowed to erect the depot building mentioned in the articles of agreement with the city, dated March 21st, 1870, one hundred feet
135 in length (instead of eighty feet) by fifty feet wide, commencing at the point mentioned in said agreement, and said company to be governed in all respects by said agreement, except as modified by this resolution.

STATE OF IOWA:
Lee County, City of Keokuk, ss,

I, S. S. Curtis, clerk of the council of the city of Keokuk, do hereby certify the above to be a true copy from the record of the proceedings of the city council of the city of Keokuk.

Witness my hand and the seal of said city, this 18th day of October, A. D. 1875.

S. S. CURTIS,
Clerk of the Council of the City of Keokuk.

136 This agreement, entered into by and between the city of Keokuk, Lee County, Iowa, of the first part, and the Keokuk and St. Louis Packet Company of St. Louis, Missouri, of the second part, witnesseth: That the party of the first part, for the consideration hereinafter mentioned, does hereby lease, demise, and let unto the second party the following-described real estate, to wit: a part of the proposed new levee, commencing at a point on the southerly line of Johnson street extended, and the toe of the said levee; thence down the river along said toe one hundred and fifty feet to a point; thence back from and at right angles to said toe to said road-track leading to the elevator; thence along the said railroad-track to Johnson street; thence along the southerly line of Johnson street extended, to the place of beginning, and to be privileged, authorized, and permitted to erect thereon a comely building for a depot, fifty feet wide by
137 eighty feet long, commencing at a point on the southerly line of Johnson street extended, and high-water mark; thence down the river on a line parallel with the toe, eighty feet, to a point; thence back from and at right angles to said last-mentioned line, fifty to a point; thence eighty feet to Johnson street; thence along the southerly line of Johnson street to the place of beginning; to have and to occupy and hold the space occupied by the said depot, and the space above the said depot, and the space between the said depot and low-water mark on the Mississippi River, except for the passage of teams, wagons, and all other kinds and descriptions of vehicles and of persons along the space outside of said depot and the river, exclusively, for the term of ten years from the date of the receipt by the mayor of the city of Keokuk of notice in writing from the president of the second party of the acceptance of the terms of this instrument; and to have and to hold
138 the space first above described not enclosed within the lines of the depot building and the space to the river, in conjunction with all other persons, companies, and corporations, when not in actual use of, or occupancy by, the second party, and when not necessary for the actual use or occupancy for the boats of the second party, for the term of ten years from the time these articles take effect. During the term of this lease the second party shall pay and render as wharfage the same sums and amounts of money paid by other persons, companies, and corporations, according to the ordinances and resolutions of the city council of Keokuk; the second party shall not use and occupy the said leased premises otherwise than is customary for landings for steamers and storing merchandize for shipping purposes, without reward, for the convenience of shippers and commerce, and said merchandise shall not
139 remain on said leased premises only for a reasonable length of time, to be governed by the police regulations for the government of the levee, according to the ordinances and resolutions of the city council now in force, and that *that* may hereafter be adopted and passed. No building, boats, or other permanent obstruction shall be erected and

placed upon said premises during the term of this lease. The building erected in accordance with terms of this instrument shall be removed at the expiration of the term of this lease by the second party at their expense and charge; and if not so removed within a reasonable time after the expiration of the term, to be decided upon by the city council, the same may be removed at the expense and charge of second party by the first party.

The first party shall not be liable for damages by reason of the failure of any part of the terms provided for by this instrument in case
140 a court of competent jurisdiction decide that the first party had not the power and authority to make such lease with the second party.

For and in consideration of the premises, and the consideration hereinafter specified, the second party agrees to fill in with earth the space first above described, supplying and furnishing therefor as much earth as shall be necessary at the rate of thirty cents per cubic yard; and to furnish rock of a good and merchantable character to macadamize the surface of the said space outside of the building or depot, furnishing therefor as much macadam as shall be found necessary, at the rate of one and $\frac{50}{100}$ dollars per cubic yard. The said work to be done according to the plans adopted, or hereafter to be adopted, for the extension of the levee under the direction and supervision of the city engineer, and shall be paid for according to the measurements of the city
141 engineer in new wharf bonds at their par value upon the estimates of the city engineer, and shall to the grade of the new proposed levee. All questions about measurements shall be settled by the city engineer.

The depot-building shall be erected according to the plans to be adopted by the mayor and city engineer.

The earth-filling shall be completed by the first day of August, A. D. 1870, and the whole work shall be completed by the first day of January, A. D. 1871.

Witness our hands and seals this 2nd day of March, A. D. 1870.

(Signed in duplicate.)

ANDREW J. WILKINSON, *Mayor.*

{ SEAL OF CITY }
{ OF KEOKUK. }

J. S. McCUNE, *Prest.*

[25-ct. rev. stamp, U. S., canceled.]

142 By resolution of the council passed April 5th, 1870, the Packet Co. were allowed to build depot 100 feet long instead of eighty feet.

B. S. MERRIMAN, *Clerk.*

I, B. S. Merriman, clerk of the council of the city of Keokuk, do hereby certify the foregoing to be a correct copy of the agreement between the City of Keokuk and the Keokuk and St. Louis Packet Company, on file in my office.

Given under my hand and the seal of said city this 7th day of August, A. D. 1871.

[SEAL.] (Signed) B. S. MERRIMAN, *Clerk.*

Copy of endorsement of the back of the written agreement:

"JULY 1ST, '70.

"This lease is hereby accepted.

"J. S. McCUNE,
"*Pres. Keokuk Packet Co.*"

143 I, B. S. Merriman, clerk of the council of the city of Keokuk, do hereby certify the foregoing to a correct copy from the original on file in my office.

Witness my hand and *and* the seal of said city this 7th day of August, 1871.

B. S. MERRIMAN, *Clerk.*

(Page 1.) EXHIBIT F.

COUNCIL-ROOM, *March 3rd*, 1873.

The petition of the Mississippi Valley and Western R. R. Company for the privilege of laying tracks and building depots on the wharf between Bank and Johnson streets was referred to the wharf committee, with power to act.

144 COUNCIL-ROOM, *April 7th*, 1873.

The wharf committee, to whom was referred the petition of the Mississippi Valley and Western Railway Company, asking the privilege of laying the tracks and building depots on the wharf below Johnson street, reported a contract between said company and the city. Whereupon said contract was approved, and the mayor authorized to sign the same on behalf of the city.

2 STATE OF IOWA,
County of Lee, City of Keokuk, ss:

I, S. S. Curtis, clerk of the council of the city of Keokuk, do hereby certify the above to be a true copy from the record of the proceedings of the city council of the city of Keokuk, Iowa.

Witness my hand and the seal of said city this 18th day of October, A. D. 1875.

[SEAL.] S. S. CURTIS,
Clerk of the Council of the City of Keokuk.

145 3. This agreement, made and entered into by and between the city of Keokuk, party of the first part, and the Mississippi Valley and Western Railway Company, party of the second part, witnesseth:

That the first party hereby grants to the second party, subject to all the conditions and provisions of ordinance No. III, passed June 9th, 1868, and all ordinances now in force, and that may hereafter at any time be passed by the city council of the city of Keokuk pertaining to the wharf, so far as applicable thereto, the use of that portion of the levee below the southerly line of Johnson street and commencing at the scale-track of the Des Moines Valley Railroad Company, curving in a south-easterly direction so as to be at a point two hundred feet southerly of the south side of Johnson street, forty-five feet from the said scale-track
146 and thence southerly in a curved line, so as to be at the northerly line of Exchange street, sixty-five feet from the said scale-track, and thence in a straight line to a point one hundred and fifty feet below the southerly line of Bank street, and thence thirty feet wide along the easterly side of and adjoining the main track of the Des Moines Valley Railroad Company, provided by ordinance No. III, to the creek west of Patterson and Timberman's pork-house: To have and to use the same as depot-grounds, railroad-tracks, side-tracks, turn-outs, spurs, switches, &c., with the privilege of erecting a passenger and freight depot upon a portion of said levee, commencing on a line two hundred feet south of the southerly line of Johnson street, and extending

of even width to the northerly line of Exchange street, and the right
147 to lay and locate on said portions of said levee, on the westerly side of said depot, a track at a proper distance from the said scale-track and main track of the Des Moines Valley Railroad Company, so as not in any manner to interfere with the same, and to extend to the creek west of Patterson and Timberman's pork-house; and also the right to lay and locate a track easterly of the said depot, running on a curved line from the southerly side of Johnson street, so as to be at a point two hundred feet south of the place of beginning, forty-five feet from the said scale-track, thence southerly so as to enter the said westerly track above mentioned two hundred feet south of the southerly line of Bank street; and also the right to lay and locate a third track south of the said depot, between the easterly and westerly track above mentioned, extending from a point on the said westerly track
148 below Bank street north to the said depot, as will fully appear by reference to a plan hereto annexed, marked "Exhibit ," and made a part of this agreement.

And the said second party shall be privileged to fill in with earth and other materials the said portion of said levee, and prepare the same in a proper manner for the location of the said depot and tracks at their own expense, provided that the said filling shall become the property of the first party after the removal of the said depot and tracks:

To have and to hold the said portion of said levee subject to the will and pleasure of the city council, with three months' written notice to vacate the same. It is specially understood by and between the parties hereto that in no event shall the first party be liable for dam-
149 age in the event that the second party shall not be able to obtain possession of the whole or any part of the above-described levee, or at any time be dispossessed of the same, or any portion of the same.

Nor shall the first party be liable for damages by reason of a failure of any part or the whole of this instrument.

It is further understood and agreed that the filling in and preparation of the said levee, as above provided for, and the location of the above-named tracks, switches, turn-outs, spurs, &c., and the erection of the depot, and all work provided for by this agreement, shall be done under the direction of the wharf committee and city engineer.

Witness our hands seventh day of April, A. D. 1873.

(Signed) CITY OF KEOKUK,
Per HENRY N. ROTHERT, *Mayor*.

(Signed) MISSISSIPPI VALLEY AND WESTERN RY. CO.,
By E. PRATT BUELL,
General Manager.

150 (Endorsed:) Filed Oct. 18, 1876. Ed. R. Mason, clerk.

151 United States circuit court, district of Iowa. Wednesday, October 17, 1876.

HIRAM BARNEY
vs.
CITY OF KEOKUK, THE KEOKUK AND DES Moines Railway Company, The St. Louis, Keokuk and Northwestern Railway Company; The Keokuk Northern Line Packet Company, The Toledo, Peoria & Warsaw Railway Co.; The Toledo, Wabash & Western Railway Co. } No. 1952. Law.

This cause having been heretofore submitted to the court, a jury having been waived by stipulation of parties filed herein, the parties having appeared as follows:

The plaintiff, Hiram Barney, by Geo. W. & A. J. McCrary, J. L. Rice, and W. B. Collins, his attorneys; the defendant, The City of Ke-
152 okuk, by John Gibbons & Craig & Collier, its attorneys; The St. Louis, Keokuk & Northwestern Railway Company, and The Keokuk Northern Line Packet Co., by Gillmore and Anderson, their attorneys; The Keokuk and Des Moines Railway Company, by John Tyffe & Craig & Collier, its attorneys; The Toledo, Peoria & Warsaw Railway Co., by Ingersoll and Bush, its attorneys; The Toledo, Wabash & Western Railway Co., by Seaton & Spaan, its attorneys.

And the court, having fully considered the same, being now fully advised, finds and adjudges that the plaintiff, Hiram Barney, is the owner in fee-simple, subject to the easement hereinafter stated, of the real estate described in the petition, to wit, all the land lying and being in front of lots five (5) and six, (6,) in block three, (3,) in the city of Keokuk, Lee County, Iowa, and extending from the front line of said lots to the Mississippi River the full width of said lots, and that he is entitled
153 to the possession of the same, subject to the right of the public to use the same as a public highway or street and for wharf purposes.

And the court further finds and adjudges that the defendants The Keokuk and Des Moines Railway Company, under pretended authority from the defendant The City of Keokuk, has unlawfully entered upon and now illegally occupies so much of said premises as is covered by the freight-depot or freight-house of said railway company, situated thereon, and that plaintiff's damages by reason of the unlawful use and occupation of the same up to this date by said Keokuk and Des Moines Railway Company amounts to the sum of six hundred dollars.

It is therefore ordered and adjudged that the plaintiff have and recover of the defendant The Keokuk and Des Moines Railway Company the said sum of six hundred dollars, with costs of this suit, taxed
154 at $, and that the defendant go hence without day, and recover their costs herein taxed at $, and that execution issue therefor.

155 Know all men by these presents that we, Hiram Barney, as principal, and Lewis T. Barney, as surety, are held and firmly bound unto The City of Keokuk, The Keokuk and Des Moines Railway Company, The Toledo, Wabash and Western Railroad Company, The St. Louis, Keokuk and Northern Packet-Line Company, The Toledo, Peoria and Warsaw Railroad Company, and The Iowa Coal Company, in the full and just sum of five hundred dollars, to be paid to the said parties, their executors, administrators, or assigns; to which payment,

well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, by these presents, sealed with our seals and dated this day of , in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at a term of the United States circuit court, between Hiram Barney as plaintiff and the above-named parties as de-
156 fendants, judgment was rendered against the plaintiff upon certain questions shown by record, and the said plaintiff having obtained a writ of error and filed a copy thereof in a clerk's office of said court to reverse the judgment in said cause, and a citation directed to the said defendants, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, 1876:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute said error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sgd.) HIRAM BARNEY,
By GEO. W. AND A. J. McCRARY,
His Attys.

(Sgd.) LEWIS W. BARNEY.

Sealed and delivered in presence of—

Nov. 2, 1876.—Approved by—

J. M. LOVE.

Filed Nov. 2, 1876.

E. R. MASON, *Clerk.*

157 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Keokuk, The Keokuk & Des Moines Railway Company, The St. Louis, Keokuk & Northwestern Railway Company, The Keokuk Northern Line Packet Co., The Toledo, Peoria & Warsaw Railway Co., The Toledo, Wabash and Western Railway Co.:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Iowa, wherein Hiram Barney is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable James M. Love, judge of said court, at Des Moines, in said district, this 2 day of November, 1876.

J. M. LOVE, *Judge.*

(Indorsement on cover:) **No. 958. Hiram Barney, plaintiff in error, vs. The City of Keokuk, The Keokuk & Des Moines Railway Company, The St. Louis, Keokuk & Northwestern Railway Company, The Keokuk Northern Line Packet Co., The Toledo, Peoria & Warsaw Railway Co., The Toledo, Wabash & Western Railway Co. Iowa C. C. U. S. Filed 21st December, 1876.**

Supreme Court United States.

HIRAM BARNEY,
Plaintiff in Error,
vs.
THE CITY OF KEOKUK AND OTHERS.
Defendants in Error.

No. 958,

Error to the Circuit Court of the United States for the District of Iowa.

Argument of GEORGE W. McCRARY,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

HIRAM BARNEY,
Plaintiff in Error,
vs.
THE CITY OF KEOKUK,
THE KEOKUK & DES MOINES R'Y. CO.
THE ST. LOUIS, KEOKUK & NORTHWESTERN R'Y. CO.
THE KEOKUK NORTHERN LINE PACKET CO.,
THE TOLEDO, PEORIA & WARSAW R'Y. CO.,
THE TOLEDO, WABASH & WESTERN R'Y. CO.,
Defendants in Error.

ERROR TO CIRCUIT COURT UNITED STATES DISTRICT OF IOWA.

OPENING ARGUMENT FOR PLAINTIFF IN ERROR

The plaintiff in error, Hiram Barney, is the owner in fee of lots 5 and 6, in block 3, in the city of Keokuk, Iowa, which lots front upon Water street and

the Mississippi river. The plaintiff in error claims to own the fee of all the ground in front of said lots down to the river, and this claim is sustained by the decision of the court below. The original space in front of said lots has been extended by filling in so that said space originally only about 100 feet. is now over three hundred feet in extent. The subject matter of this suit is the ground in front of said lots down to the river, including the "made ground." When the city was laid out the space between the front of said lots and the original bank of the river was designated as "Water street." The court below held that the added ground partook of the character of that to which it was added.

The space in controversy in front of said lots is occupied by ten railroad tracks and by two permanent buildings. One of the buildings is a railroad freight depot, and the other is a packet depot building. The railroad companies with their several tracks occupy under an alleged license or permission from the city.

The Keokuk & Des Moines Railway Co., and the Keokuk & Northern Line Packet Co., severally erected and now occupy and use said buildings under a similar authority or license. The plaintiff in error never consented to this appropriation and use of the ground, nor has he ever received any compensation therefor. The court below held that the whole space was the property of plaintiff in error, but subject to the right of the public to use it as a street and also for wharf purposes, and that the several

railroad tracks and the packet depot building were lawfully and properly placed and kept upon the property, but that the railway freight depot was unlawfully erected and maintained thereon.

These and all other material facts are found and certified by the court and are not open to controversy in this case. (See the court's finding, transcript, page 19).

The rulings of the court below upon the legal questions presented are also certified by the court (page 23).

I submit that the court erred in the following rulings :

1. In holding that under the facts stated the railroad companies named had a right to lay down their tracks upon the ground in question, and to run their cars and engines upon the same.

2. In holding that Water street in the city of Keokuk was dedicated for levee and wharf purposes as well as for a street.

3. In holding that the building erected by the defendant, the Keokuk Northern Line Packet Company, known as the packet depot building, was properly and lawfully erected and maintained upon said ground.

4. In holding that (assuming said ground to be a levee or wharf) the erection and maintenance of

said packet depot building was, and is a reasonable and proper use of the same.

I will consider these questions separately and in their order.

I.

Plaintiff in error being, as the court below correctly held, the owner of the fee of the ground in question, the city could not without the owner's consent, and without compensation, take it and devote it to the use of railroad companies to be covered with numerous railroad tracks, and used as a passage way for cars and engines. This question has been decided by this court in the case of *Railroad Company vs. Shuermier*, 7th *Wall.* 272. That was a bill to enjoin a railroad company from taking possession and building its railroad upon a street in the city of St. Paul. There was a dispute as to whether the fee was in the plaintiff, in railroad company, or in the city, and one of the points made was that "the complainant in dedicating the premises to the public as a street, levee and landing, parted with all his title to the same and that the entire title vested in fee in the state."

The question was distinctly made whether even in a case *where the fee of the street was in the state or municipal corporation*, it was competent for either to authorize its use for railroad purposes. And the court held that it was not within the power either of the state or of the city to divert a street from its proper use and authorize railroad tracks to

be laid upon it and steam engines and cars to run over it. The language of this court is as follows (pp. 289-290):

"Attempt is also made to justify the acts of the respondents, as grantees of the state, upon the ground that the complainant, in dedicating the premises to the public as a street, levee and landing, parted with all his title to the same, and that the entire title vested in fee in the state. Respondents rely for that purpose upon the statute of the territory of Wisconsin, which was then in force in the territory of Minnesota. Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defense to this suit, because it is nevertheless true that the municipal corporation took the title in trust, impliedly, if not expressly designated by the acts of the party in making the dedication. *They could not, nor could the state convey to the respondents any right to disregard the trust or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant.*"

This ruling is abundantly sustained by the great weight of authority.

Judge Redfield in his work on Railways, after stating that some of the earlier cases held the doctrine that a steam railway was only an improved highway, proceeds thus:

"But this view upon more careful consideration "being *found untenable*, the retrocession of the "Courts from their former false assumption, natural-

"ly gave them an unnatural impulse in the oppo-"site direction, by which the conclusion was arrived "at, that all railways must equally be an additional "burden upon the fee." Vol. I, Sec. 8, page 312. See also Sec. 299 and note, same work.

Judge Dillon says, in his work on Municipal Corporations, section 576, (after summing up the cases on the question):

"The weight of judicial authority, at present, un-"doubtedly is, that where the public have only an "easement in the streets, and the fee is retained by "the adjacent owner, *the legislature cannot* under "the constitutional guarantee, of private property, "authorize a steam railway to be constructed there-"on, against the will of the adjoining owner." See also Sec. 558, same work.

The legislature cannot authorize the appropriation of a street for railroad purposes without compensation to the owner of the fee.

Wagner, vs. Troy Uuion R R. Co., 25 N. Y 526, 16 N. Y. 97, 24 N. Y. 655, 658.

Bolling vs. City of Petersburg, 3 Rand. (Va.) 563, 13 Conn 309, 3 Conn. 90, 5 Conn. 305.

Imlay vs. Union Branch R. R Co., 26 Conn. 255.

Ford vs. Chicago & N. W. R. Co., 14 Wis. 616.

Pomeroy vs. C. & M. R. R Co., 16 Wis. 640.

Perley vs. Chandler, 6 Mass 453, 21 Wis. 602, 14 Wis. 609.

Cooley on Const. Lim., page 546, *et seq.*, page 548 and note 2.

Dillon on M C., Sec 558 and note.

Redfield on Railways, page 299 and note page 309, 311.

14 Ohio St 548

7th Ohio St. 459.

7 Indiana, 479; 38 *id.*

Haynes vs. Thomas 3 Hill, 567.

Dillon on M. C., section 573 and note; section 575 to 577 inclusive.

Mahin vs. Railroad Co., 24 New York, 658.

Fletcher vs Railroad Co., 25 Wend. 462.

Bissel vs. Railroad Co., 23 New York, 61.

Clark vs. Blackmas, 47 New York, 150.

S. P. R. R. Co. vs. Reed, 41 Cal. 256.

Harrington vs. R. R. Co., 17 Minn. 215—224.

Gray vs. R. R Co., 13 Minn. 315.

Williams vs. Plank Road Co., 21 Mo. 580.

In this case there is no pretense of express legislative authority, and the only question is, whether, under a power to *regulate streets*, the city may, against the objection of the owner of the fee, authorize their use for this purpose. The following authorities hold that the city has no such power:

Wagner vs. Troy Union R. R. Co., 25 N. Y. 526.

Williams vs. N. Y. Central R R., 16 N. Y. 97.

Presbyterian Society of Waterloo vs. Auburn R. R. Co., 3 Hill 567.

Lade vs. Sheppard, 2 Strange 1004.

Inhabitants of Springfield vs. Conn. River R. R. Co., 4 Cush. 63.

Ford vs. Chicago & N. W R. R. Co., 14 Wis. 663.

Weisbold vs. Chicaga & N. W. R. Co., 21 Wis. 602.

Lackland vs. North No. R. R. Co., 31 Mo. 180.

Craig vs. Rochester City & Br. Railway, 39 Barb. 494

Warren vs. State, 5 Dutcher 393.

Veazie vs. Penobscot Railroad Company, 49, Me. 119.

Brown vs Duplessis, 14 La. An. 842.

Pomeroy vs. Mills, 3 Vt. 279.

Dil. on M. C. section 521, 558.

Flemingsburg vs. Wilson, 1 Bush. [Ky.] 203.

State vs. Railroad Company, 3 Zabr. 360.

I might here close my argument upon this point and rely confidently upon the decision in Shuermier vs. The R. R. Company supported as it is, not only by the strongest reason but by authority, were it not that the court below based its ruling upon certain decisions of the Supreme Court of Iowa alleged to be in conflict with the doctrine of this court, and which were followed by the court below upon the ground that they were *decisions giving a construction to a statute of that state*, and as such to be followed by the Federal Courts.

In this the court below was mistaken. *It has never been held by the Supreme court of Iowa that any statute of that state authorizes a municipal corporation to devote one of its streets to the use of a railroad company for laying its tracks and operating its road thereon, without the consent of the owner of the fee and without compensation where that owner is a private person.* This is precisely what was decided by the court below in this case upon the sup-

posed authority of some Iowa cases, but I repeat the Iowa cases hold no such doctrine. Let us examine them briefly.

The statute of Iowa, and the only one, which has been construed as authorizing the use of the streets of a city for railroad purposes, is "an act granting to railroad companies the right of way," the 8th section of which is as follows:

"Any railroad corporation may raise or lower any turnpike, plank road or other way, for the purpose of having their railroad pass over or under the same; and in such cases said corporation shall put such turnpike, plank road or other way, as soon as may be, in as good repair and condition as before such alteration." Rev. of 1860, page 318.

The cases in the Supreme court of Iowa in which that court has considered the power of a city to authorize the laying of railroad tracks in streets are the following:

Milburn vs. Cedar Rapids, 12 Iowa, 246.
City of Clinton vs. Railroad Co., 24 Iowa, 455.
Slatten vs. Railroad Co., 29 Iowa, 148.
Cook vs City of Burlington, 30 Iowa, 94.
City of Davenport vs. Stevenson, 34 Iowa, 225.
Ingraham vs. Railroad Company, 34 Iowa, 249.
Cook vs. City of Burlington, 36 Iowa, 357.
Chicago, &c., Railroad Company vs. Mayor of Newton, 36 Iowa, 299.

An examination of these cases will show that it

has not been decided that the municipal corporation can cause its streets to be used for railroad purposes *where the fee is in the adjoining proprietor* without his consent and without compensation, and that the statute above quoted has never been construed as giving any such power to the cites of that state.

Milbourn vs. Cedar Rapids.

In Milbourn vs. Cedar Rapids, section 8 of the act of 1853 above quoted was construed not only as authorizing railroad companies to "pass over or under" streets and highways, but also as authorizing them to run their tracks "upon them lengthwise" (p. 258).

But the court put its judgment in that case upon the ground that the fee of the street in question was in the city and not in the adjoining proprietor.

And upon the point involved in the present case as to the right of the city to authorize the use of a street where a private person holds the fee, the court said:

"In the sense of the statute the words 'over' and 'upon' are synomynous and without giving it an unduly liberal construction, we can safely conclude that the legislature did mean by such language to give to railway companies the prvilige of running their tracks upon the highways of the country and streets in the city, *but not without obtaining in addition to this legislative authority the right of way from the party or corporation holding the fee in such easements*

for the reason that it has been held that such an appropriation of a common highway is the imposition of an additional burden upon it and is the taking of the property of the owner of the fee within the meaning of the constitutional provision which prohibits such taking without compensation."

This construction of the Iowa statute so far from sustaining the decision of the court below is in necessary conflict with it, for the court below held that it was not necessary for the railroad companies to obtain the right of way from the party holding the fee. A reference to the Iowa statute itself will show, that the legislature contemplated the payment of damages to the owner of the property taken for railroad tracks in all cases, and made ample provision for ascertaining the amount of such damages and enforcing payment thereof. (Sec. 4 *et seq.* act of 1853. Rev. of 1860, p. 218 *et seq.*).

And it is settled law in Iowa that where property is taken for railroad purposes under this act *without compensation*, it may be recovered from the company by the owner. *Daniel vs Railroad Company*, 35 *Iowa*, 129.

The case of *City of Clinton vs. the Railroad Company*, was a suit to enjoin the laying of railroad tracks in the streets of that city. The court said (p. 469) "the fee of the streets it is conceded is in the city in trust for the public." The case therefore did not present any question as to the rights of private owners of the fee of the streets in such cases. The court did express doubts as to

whether a city holding the title to its streets in trust for the public, is entitled to compensation for the laying of tracks therein, but no doubt was expressed as to the right of a "private" owner to receive such compensation.

Said Judge Dillon in delivering the opinion, (page 473).

"As to a highway in the country, or a street in a city, where the fee is in the adjoining owner, I am not prepared to say that to lay a railroad down upon it, is not an additional burden, for which such proprietor is entitled to compensation."

Slater vs. Railroad Company

This was an action for damages to plaintiff's lot, resulting from an enbankment thrown up by a railroad company in grading for its track along a street in Des Moines. The previous decisions of the Supreme Court of Iowa, on the subject, are cited and approved, but it was not claimed that the plaintiff was the owner of the fee of the street, and there was no discussion of the question, of the power of the city, or the railroad company to take the street without compensation.

Cook vs. Burlington, 30 *Iowa*, 94

This case involved the construction of an Act of Congress, and not a statute of Iowa. It did not present the question now under consideration, because the title to the premises in question, was found not to be in the adjoining proprietor. The

Act of Congress, under which the city of Burlington was laid out, reserved the *locus in quo* "for public use, to remain forever for public use as public highways and for other public uses." And the Court said, (p. 101): "In our judgment, the plaintiffs by their purchase of lots abutting upon this reservation, did not acquire the fee title therein." And again: "As the plaintiff's have not the *fee title* to the reservation and accretion, have they any interest therein, which they can protect in a Court of equity?" I dismiss this decision with the remark, that it did not involve the construction of any state law, and did not present or decide the point now under consideration.

City of Davenport vs. Stevenson.

The first sentence of the opinion says: "It is conceded that the city of Davenport owns the fee in the streets," and the only point decided, is that the adjacent lot owener has no such interest in the streets *of that city*, as will enable him to recover damages for the use of the street for a Railroad track

Ingrahan vs. Railroad Company.

This case, like Cook vs. Burlington, involved the the construction of Congressional legislation, and was not a case where the parties complaining held *title in fee* to the ground occupied by the railroad company. In the statement of the case, (p 249), it is said: "It is shown that the city of Dubuque was originally laid off under authority of certain

Acts of Congress, and that by a subsequent act, all right of the United States to the highway or street named, *was relinquished to the city of Dubuque*, reserving the rights of third persons, *to the use of the same*." And the Court in its opinion, states that the plaintiff based his claim for relief upon three grounds, the last of which was "the existence *in the city of the legal title to the street*, to be held subject to the rights of the plaintiffs to the use of the same" The opinion will be examined in vain to find a single expression in favor of the doctrine that the private owner of the fee of a street, has no vested rights that are invaded by the appropriation of the street for railroad purposes.

Cook vs. the City of Burlington, 36 *Iowa*, 357.

This was but another phase of the case between same parties already noticed. It did not involve the question we are now considering. Among the facts agreed upon was the following:

"By Act of Congress of February 14th, 1853, the title of said strip of land was *vested in the city*, subject to certain restrictions." The only question was, whether the city *being the owener of the fee*, could lease it to the railroad company "for such railroad uses and puropses connected with their railway, as is or may hereafter under the laws of this state be lawful to do with lands condemned by right of eminent domain, and thus acquired by railroads, but for no other uses or purposes." It needs no argument to show how very materally this case differs from the one at bar, where it is asserted, not

that the city may lease the ground owned by it, but that it may take the plaintiff's land from him without his consent, and without compensation, and convey the perpetual use to various railroad companies, to be occupied by their numerous tracks, cars and engines.

Chicago, &c., Railroad Company vs. the Mayor of Newton.

What I have said of other cases applies to this. There was no claim of title by any adjoining lot owner, and the question now under consideration did not arise. There was some discussion of the question, whether *the city* could claim damages as a condition precedent to the use of the street, but the Court without passing upon this question, held that "these damages are not of such a character that their payment must precede the use of the street for such a purpose." This was upon the authority of the City of Clinton vs. Railroad Company *supra*, where it was held that the constitutional provision which declares that "*private* property shall not be taken for public use without just compensation," does not apply to the property which a city may have in its streets. The Court said, (p. 474): "The streets of a city are not *private* property of the corporation in such a sense that the Legislature connot, *so far as regards the corporation*, authorize the same to be used for any public purpose for which it may see fit, unless it makes compensation to the city for such use."

It appears from the cases we have now cited, to be entirely clear,

1. That this Court holds the doctrine, that a city cannot, nor can the state, convey to a railroad company, any right to appropriate a public street to the use in question, *even where the fee is in the municipal corporation.* And of course, the same doctrine will be applied, and for much stronger reasons, where the fee is in the adjoining proprietor.

2. That the decisions of the Supreme Court of Iowa, are in conflict with the doctrine of this Court only as to the power of a city over its streets *where the fee is in the city.* The Supreme Court of Iowa has made no decision affirming the doctrine that a city can make the appropriation in question where the fee is in a private person.

3. The Supreme Court of Iowa, in construing a statute of that state, has held that where land is taken from a private person for public use, (i. e. for right of way for a railroad) without condemnation and compensation under the statute, it may be recovered by the owner. Daniel vs. Railroad Company, 35 Iowa, 129.

This being the construction of an Iowa statute by the Supreme Court of that State, will be followed by this Court.

Seeing the force of these suggestions, counsel for defendants in error will doubtless insist, in this Court as they did in the Court below, that the fee of Water street in Keokuk, is in the city, and not

in the adjoining owners. An examination of the finding of the Court below, will show that this claim is wholly groundless, and that the Court below was quite right in holding that the fee of the *locus in quo* is in plaintiff in error.

The city of Keokuk is situated upon a tract of land, the title to which, by Act of Congress of June 10th, 1834, and a previous treaty, was vested in the half breeds belonging to the Sac and Fox tribes of Indians, (14 Stat. at Large 140).

The said city was not laid out by the proprietors, under the statute of Iowa Territory, then in force. Indeed so great was the number of persons holding undivided interests, that concerted action among them all in laying out the town, would have been very difficult, if not wholly impracticable, *and no person held anything in severalty*, prior to the decree of partition hereafter mentioned.

It will be seen by reference to the finding of the Court below, that a suit was instituted in the proper territorial Court, to partition said lands, that all the world were parties and bound by the proceedings; and that in 1841, what is known as The Decree of Partition, was rendered by the District Court within and for the County of Lee, in the Territory of Iowa, by which said tract was duly partitioned among the several owners, being for that purpose devided into 101 shares, which were drawn by persons adjudged to be the owners of undivided interests. The finding of the Court below, sets out the

portions of this decree which are material to an understanding of this question. It will be seen, by reference to that finding, that commissioners were appointed to make partition of all the lands and town lots in said half breed tract, and that they reported setting out a plat of Keokuk as part of their report, and that their report including said plat, was confirmed and adopted by the court. That this decree, by its terms, vested the title to all the ground in front of the lots fronting on Water street down to the Mississippi river, in the lot owners, is beyond dispute.

The whole tract was divided into 101 shares. The shares which embraced the lots in question, and every share containing a lot or lots fronting on Water street, contained this language:

"All the town lots included in the above share, are bounded by the middle of the streets and alleys upon which they are situated, *and the lot upon Water street also includes all the land in front of it to the Mississippi river.*"

And again, the commissioners who made the partition under the decree of the court, in their report, which was confirmed and made part of the decree, used the following language: "In describing the boundaries of town lots situated on Water street, in the towns of Keokuk and Nashville, we have made *them to include all the land in front of them to the Mississippi river, by which we mean in front of them, facing the river parallel with the streets running from Fourteenth to water street in the town of Keokuk, &c.*"

Surely no argument is needed to show that under this decree, plaintiff is the owner of the fee of the ground in front of his lots and between them and the Mississippi river. And this proposition is as clear upon authority as it is upon reason. It has been several times decided by the Supreme Court of Iowa.

In Haight vs. the City of Keokuk, 4 Iowa 199, the clauses of the decree of partition which we have quoted, were commented upon and the court held that "by this decree or partition among the proprietors, *those fronting on the river own the land--the fee—to the river.*"

And in Milburn vs. Railroad Company, 12 Iowa 246, the court quotes from and approves the decision, upon this point, in the Haight case, and says that Keokuk is an exception to the general rule in Iowa, that the fee of the streets is in the corporation because it was not laid out by the proprietors under the statute of 1839, "but by certain commissioners appointed by the court to make partition of the same." And the court, on page 254, quotes from the decree, the language we have already copied, to show that the fee of the streets was not given to the corporation but to the adjacent owners.

It will not be denied that the proprietors, or the Court acting for them in the partition suit, had a perfect right to retain the fee of the streets. There was no statute prohibiting them from laying out a town and dedicating the streets for street purposes only.

There was a statute which provided for the acknowledgment and recording of a plat in a certain manner by the proprietors. Of the effect of this statute I will speak presently. (Laws of Iowa Territory 1839, page 454, sec. 5).

This statute very clearly did not *require* them to convey the fee to the public. This point was decided in Dubuque vs. Benson, 23 Iowa, 248. And see Dillon on municipal corporations, sec. 492, and cases cited.

But it will be contended that the streets of Keokuk were dedicated to the public *before the decree of partition*, and that by such dedication the fee was vested in the corporation.

To sustain this view it was shown in evidence that the town of Keokuk was first platted as early as 1837, and an old map which purports to have been made by one Isaac Galland, and by him presented to the city council of Keokuk, and also a piece or fragement of another old map found in the Recorder's office, but not of record, were introduced. These old maps were offered to prove that the city of Keokuk had been laid out and platted prior to the decree of partition and in accordance with the act of 1839, or of a prior similar act passed in 1838, (laws of Wisconsin Territory, 1837 and 1838, page 241, laws of Iowa Territory 1839, page 453).

An examination of these statutes will show, that they required the following acts to be done as con-

ditions precedent to any donation either of the use or of the fee of the streets to the public.

1. That the town shall be laid out by the *proprietors*. It will hardly be claimed that A could lay out a town upon B's land and by that act dedicate the streets to the public.

2. That the "plat or map" should be "made" and "certified" by the "County Surveyor," and if there should be "no County Surveyor in the county then in that case by the County Surveyor of an adjacent county."

3. That the "County Commissioners or proprietor or proprietors of the town" should mark the corners of the lots, and that the "County Commissioners and every other person or persons whose duty it should be to comply with the foregoing requisitions" should acknowledge the plat, and

4. That "the certificate of the surveyor and acknowledgment" should "be recorded, and form part of the record."

The facts found by the court below show, that not one of these pre-requisites was complied with.

(A) At the time these old maps were made the title to the land was in the half-breed Indians, and their grantees, *no one owning anything in severalty*. One of the maps was made by Isaac Galland, who signed it as "trustee for himself and other proprietors."

He was not found by the decree of partition to have had any interest in the land. He was one of five trustees for a corporation, known as the New York Company, which company owned an undivided interest in the said tract. But it required a majority of the five trustees to lay out a town *even on their own land*, (see articles of Association of New York Company set out with finding of court below).

There is no proof that Galland ever owned the land on which Keokuk was laid out. On the contrary the proof is clear that he did not own it. The decree of partition, which determided the question of ownership of that land, did not find Galland to be the owner of a single one of the 101 shares into which the premises were divided. By the articles of Association of the New York Company, which are found among the exhibits in the partition proceedings, it would seem that Galland originally had a small undivided interest in the stock of that company, and the company owned certain undivided interests in the half-breed tract. I do not care to discuss the question, whether Galland retained his undivided interest in the undivided interest of the New York Company Suppose he did. It is clear that the owner of an undivided interest in land cannot lay it out as a town so as to bind his co-tenants, unless he is shown to have had express authority from them. In the first place the New York Company itself had but an undivided interest in the half-breed tract, and in the second place, Galland had only eight forty-eighth parts of the interest of said company. The title of the company

was vested in five trustees, who held it as joint tenants and not as tenants in common. Besides, the finding shows affirmatively that Galland had no authority to make a plat of a town, even to bind the New York Company, because as already suggested he was but one of five trustees and the articles of association of that company expressly provided that, town sites were to be laid out "*by said trustees or a majority of them.*" In Haight vs. Keokuk *supra* the Supreme Court of Iowa had this map before it, as well as the decree map, and held in favor of the latter. The court said. (4 Iowa, 210),

"There is no evidence of Galland's authority to lay out a town and record its plat, other than his certificate and acknowledgment upon the map, and the fact subsequently appeariug that he had an interest in the tract of land. So far as it (Galland's map) was adopted in the report and decree it becomes of force; but where the report and decree depart from it, it is not of force."

As to the other old map, of which there is only a fragment in existence, there is nothing to show *when* or *by whom* it was made, and for this reason alone it is void. We only know this, that it was made prior to the decree of partition, and when the title was held in common by a large number of half-breed Indians and by their grantees, and so in the nature of things could not have been made by the proprietors.

(B). Neither of these old maps was made and

certified by the County Surveyor. The Galland map appears to have been made by a person who styles himself "Deputy Surveyor of the half-breed Reservation in Lee county, Iowa," probably a person who had been employed to survey the tract, by some one, but not an officer known to the territorial laws.

(C). Neither of said maps is acknowledged by the county commissioners or other persons whose duty it was to comply with the law; neither was ackowledged at all by any one.

(D). Neither of said maps was ever recorded, as required by said statute. The maps are not found of record. One is found in the office of the city of Keokuk, where it has been since it was presented to the city council by Isaac Galland November 27th, 1850. The other, a mere fragment, is found in the proper recorder's office, but not of record. Besides there is no "certificate of the surveyor and acknowledgment to be recorded as required by sec. 4 of said act of 1839.

But there is another reason why these maps are void as against the decree of partiton, and the map embodied therein. They were both made *pending the suit of the partition of the half-breed lands.* The petition in that case was filed April 14th, 1840. (Transcript page). The Galland map, ~~testified to by the witnesses, Merriam and Miller~~, was made and signed July 30th, 1840, and filed in the recorder's office of the following October. The old piece, or fragement of a map found in the recorder's office,

~~and sworn to by Bank, the Recorder~~, seems to have been filed in the recorder's office August 1st, 1840. (It does not show when or by whom it was made, and of course, for that reason alone, is a nullity). The dates above given show that the land included in said maps was, when they were made and filed, in the possession of the court, and subject, alone, to the court's orders and decree. It is clear that Galland could not take it from the control of the court, for any purpose, without its consent or order. And since the conflict, if there be any, is between the Galland map and the one made by order of the court, and approved by its decree, we expect this court, without hesitation, to hold in favor of the latter.

And we submit further that if the old Galland map were the map of the city of Keokuk, it could not help the defendant's case. It does not dedicate Water street to the public, at all, but expressly reserves it from the dedication. All the streets and alleys "except (certain alleys named) *and Water street*," are to be public highways—so this old plat declares, and if it is good for anything, it shows that the ground in question was never dedicated to the public at all. The evidence of the defendants, therefore, if it proves anything, it proves too much.

The map of Keokuk which is embodied in the decree of partition is declared by the decree to be the map of Keokuk, and is marked on its face, as it now remains of record, "plat of the town of Keo-

kuk *made by order of the District Court of Lee County, Iowa Territony.*"

It is clear then that the court below was right in holding that these old maps, and the sale of a few lots under them, amounted at the most only to a common law dedication of the streets, and such a dedication left the fee in the lot owners.

But suppose the town had been platted and the plat recorded by the proprietors in strict accordance with the act of 1839, would this have vested the fee of the streets in the corporation? I think not.

Sec. 5 of the said act of 1839.

"Sec 5. When a plat or map shall have been made out and certified, acknowledged and recorded as required by this act, every *donation or grant* to the public or any individual or individuals, religious society or socities, or to any corporation or bodies politic, *marked or noted as such on said map or plat*, shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered, to all intents and purposes, a general warranty against such donor or donors, grantee or grantees, for his, her or their use for the uses and purposes therein named, expressed and intended to be for the streets, alleys, ways, commons or other public uses in any town or city or addition thereto, shall be held in the corporate

name thereof in trust to, and for the uses and purposes set forth, expressed or intended "

This act has never been construed by the Supreme Court of Iowa as having the effect claimed for it by counsel for defendants in error. And it is plain from the language of the act itself that the record of a town plat under it did not have the effect to convey the fee of the streets to the corporation.

It was only in case of a "*donation*" or *grant* to the public or any individual or individuals, religious society or societies, or to any corporation or bodies politic *marked or noted as such on said map or plat*, that a conveyance of the fee would result

It is true that this act of 1839 was referred to by Lowe, C. J., in his opinion in Milburn vs. The Railroad Co., 12 Iowa, 246, and the opinion was expressed that it was substantially the same as sec. 637 of the Code of Iowa of 1851, which was then before that court for consideration.

But that case did not involve or call for a construction of the act of 1839 as appears from the opinion itself which declares (page 252) that the street, the title to which was in controversy, was laid out "agreeably to the provisions of the code of 1851, sec. 637." That section provided as follows:

"The acknowledgment and recording of such plat *is equivalent to a deed in fee simple* of such por-

tion of the land as is therein set apart for public use, or dedicated to charitable, religious or educational purposes."

It requires no argument to show that there is a wide and material difference between this section and sec. 5 of the act of 1839, and that the *dictum* of the court in the Milburn case, "that the legal effect of these statutes is substantially the same," is unsound.

This act of 1839 is precisely the same word for word as the Minnesota statute upon the subject which was before this court in the case of Shuermier vs. The Railroad Co., 7th Wallace, 272, and which was also before the Supreme Court of Minnesota, and by it construed in the same case, 10th Minn., page ——. The Supreme Court of Minnesota held, upon what seems to me to be the soundest reason, that the mere recording of a town plat by the proprietor under said act without any express grant or donation of the fee to the public, did not divest the proprietor, of the fee of the streets, and only gave the corporation and the public the use of them "for the uses and purposes set forth, expressed or intended."

I conclude therefore that without doubt this court must hold.

1. That the old maps of Keokuk relied upon by defendants in error were not executed and recorded by the proprietor in accordance with the act of 1839, and,

2. That even if said maps had been executed by the proprietors and in accordance with said statute of 1839, they would not have had the effect to vest the fee of Water street in the corporation, and that, therefore.

3. It was competent for the court in rendering said decree of partition to declare as it did, "that the lots fronting upon Water street should include all the land in front of them to the Mississippi river.

And I respectfully submit that to set aside the decree map, and at this late day declare these old maps to be of binding force, would work great wrong to thousands of innocent purchasers of property in Keokuk. For thirty-five years the map embodied in, and made part of the decree of partition, has been regarded by the city of Keokuk and by all who have dealt in Keokuk property as the only valid and authoritative plat of the city.

Nearly twenty years ago the Supreme Court of Iowa in the Haight case held it to be the true map of the city, and the one which should govern as to the rights of lot owners. It is the only map of record and the only one which the courts of Iowa have ever recognized as valid I cannot suppose that this court will hesitate to follow them and affirm the decision of the court below that the decree map is valid and the title to Water street in the adjoining proprietors.

II.

The court below held that the ground in contro-

versy having been dedicated as "Water street," and being situated on the margin of the river, may be used without the consent of the owner of the fee, and without compensation "for levee and wharf purposes." In other words the court held that the dedication of this ground for street purposes authorized its appropriation and use for levee and wharf purposes. Upon this point I insist that the ruling of the court below is error.

The ground in front of plaintiff's lots, in so far as it was ever dedicated to any public use, was dedicated as *Water street and nothing else.*

It is not claimed that there was ever an *express* dedication of this ground for wharf purposes. Nothing is said about a wharf or levee in the decree of partition, in the map of Keokuk made a part thereof, nor even in the old maps produced by defendants in this case. Water street is dedicated by the same words as all the streets. The defendants rest their claim that this ground is a wharf soley upon the ground that the dedication for street purposes includes a dedication for wharf purposes, and authorizes the use of the dedicated premises for a wharf.

Does the dedication of land for a *street* include a dedication for wharf or levee purposes? I should no tstop to discuss a proposition which seems to me so free from difficulty as this, were it not for some remarks of Woodward, Judge, in the case of *Haight vs. Keokuk, supra.* It was laid down in the opinion in that case that land dedicated as a

street, may, without the consent of the owner of the fee, be used as a wharf. I insist that this doctrine is erroneous; that it is wholly without support in authority; that it will not stand the test of reason, and that it has been virtually overruled in a more receat and well considered case in the same Court. The authorities are all against *Haight vs. The City of Keokuk* on this point:

Pearsoll vs. Post, 20 *Wend.*, 131, *et seq.*

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In the leading case of *Pearsoll vs. Post*, it was held upon a most elaborate and exhaustive discussion of the subject, that the doctrine of dedication of highways, streets, and other easements, in the nature of public ways, did not extend to *public landings*. Such was the decision of the Supreme Court, and it was *affirmed* by the Court for the correction of errors. (See note on page 425, 22 Wend.)

The leading opinion in this case was delivered by Chancellor Walworth.

The decision is put upon the ground that there is a radical difference between a *landing place* and a public *street*, in this, that the former is a place where property is *deposited* until the owner can conveniently remove it, while the latter is a place where the public are permitted to pass and repass. Thus it was said by Edwards, Senator: "If the *locus in quo*, then, had been a road or public square, which is controlled by the same principles, the length of time the public have been suffered to use it is sufficient to have presumed a grant, and therefore a dedication to the public use. But here, in my view, lies the whole difficulty on the part of the defendant *It is neither a road or public square*, nor a dedication for charitable or religious purposes, *nor is it analagous to either as to the principles of dedication by user.*" And he said of the claim there set up, just what I say of the defendants' claim here, that "it is a claim which, if a lowed to prevail each individual could not enjoy, for the deposit and possession of a few individuals *might exclude the many*." I may say more in the present case, for the *possession* of a few individuals of the premises now in controversy *has* excluded, and does now exclude the many.

I ask the Court's attention to the very learned and elaborate opinion of the Supreme Court of New York, by Cowen, J., in Pearsoll vs. Post, 20 Wend., 115 to 138. On page 126 he states the distinction

between a *street* and a *wharf* or *landing place* thus:

"The *ways* on land are in general well defined in their extent, even if we include urban commons and walks, and other places of recreation and travel. The owner of the soil still retains many privileges, such as their being generally open and unincumbered, ornamented with trees, kept in proper repair open to be depastured by him, &c. The remedies for obstruction are well defined and important: an indictment by the people; an action of trespass by the owner; and on the case by the traveler for special damage; even ejectment will lie by the owner for a permanent incumbrance; *whereas, by* a customary profit *a prendre*, as of common, and above all, *a right to deposit articles of merchandise by all the world, the owner is deprived of the use of the soil itself; it is covered with buildings, or by piles of lumber, heaps of manure, or by merchandise, at the discretion of all people.*"

This was written nearly forty years ago, but it describes accurately what has been done with the ground in front of plaintiff's lots, and shows very clearly how it has been diverted from all the purposes of an open *way* or *street*.

In *Railroad Company vs. Shuermier*, this Court held that a dedication for street purposes did not authorize the city of St. Paul to authorize the laying of a railroad track within the street. (*And if they could not put a railroad track in the street, how could they turn it into a levee or wharf, and cover it all over with railroad tracks and buildings?*)

But the rule laid down in the Haight case, that the dedication of land for a street, authorizes its use for the purpose of a *levee, wharf, and landing place* is substantially overruled by the same Court in the later case of *Prosser vs. Wapello County, supra.* The question there was precisely as it is here whether land dedicated to the public as a *highway* could be used, without the owner's consent, as a *landing place?* The highway ran down to the river, and one Davis claimed the right to land his ferry-boat within it. Dillon J., said, (p. 338):

"This brings us to the next question, and that is, *whether the location of a county road on the land does, to the extent of its width on the bank of the river, deprive the land owner of his riparian rights as above defined?* And here we feel compelled to yield our doubts to the almost, if not quite, uniform current of authority, and to hold *that it does not.*"

The exact question here decided was that the owner of a *ferry* could not use a highway on the river bank "for the purpose of fastening boats and of receiving and discharging freight and passengers." "Such a use," said the Court, "*is not a public use,* so much as it is a use by the licensee or holder of the franchise for his own gain and advantage." And the principle applies with equal force to any other boat or vessel. A ferry boat is quite as much a *public* conveyance, operated for the whole community, as any other vessel can be. Another reason why a wharf is not a subject of dedication, or at least not capable of being dedicated under the name of a street, is that it is used as a source of

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Such is the voice of authority. That of reason is equally clear and satisfactory. A street is a *way*,

open, public, free for everybody, over which all may pass, in which no one can have any exclusive or special privilege. A *wharf* is a place to land and deposit goods, and for the use of which *wharfage* is usually paid. The person paying wharfage for its use *can* have, and *does* have, special and exclusive privileges, which the community at large does not have. A street cannot be obstructed. A wharf may be to a certain extent. (*Illinois, &c., Canal Co. vs. City of St. Louis*, 2 *Dillon, C C.* 70.) This case distinctly holds that "a wharf *differs* from a street in *many material* respects." (p. 83.) These differences are so apparent that further argument to show their existence would be superfluous. And yet, unless the terms *street* and *wharf* are held to be substantially *identical*, the doctrine of the Haight case on this point must fall to the ground! It may be said that a wharf is very necessary, and it may be asked what is to be done if plaintiff refuses to give up his riparian rights for its construction? We answer as did the Supreme Court of Iowa in Prosser vs. Wapello Co., "*pay him for his land*" and then take it; but don't take it without compensation, nor take it for *one purpose* and use it for *another*.

The cases cited to support *Haight vs. The City of Keokuk* on this point do not support it:

1. *Rowan's Executors vs. The Town of Portland*, 8. *B. Monroe* 232.

A town was laid out by Gen. Lytle on his own land. Water street was laid down on the plat as running along the river 100 feet wide. There was

a strip of ground between the street and the river *The proprietor sold lots representing that the town extended to and was bounded on one side by the Ohio river.* The strip was not designated in any way on the map. *Held* to have been dedicated to the public "*as a common for public use.*" Not a word was said about a *a wharf or landing place* in the case.

3. *City of Louisville vs. The Bank*, 3, *B, Monroe* 138.

This case grew out of a contract between John Rowan and the Trustees of the city of Louisville. Rowan sold to the trustees of the town, certain ground along the margin of the Ohio river, and one of the conditions of the sale was that the Trustees were to make a wharf, and were to levy tolls for its use, and to pay Rowan or his representatives one-half of such tolls. The case presented no feature like the Haight case. There was no claim of a *right* on the part of the town or of the Trustees to make a wharf without the owner's consent, and no question as to the effect of a dedication for street purposes.

3. *Trustees of Augusta vs. Perkins*, 3 *Ib.* 457. Ejectment to cover the *public square in the town of Augusta.*

This case has no analogy whatever to the Haight case. It does not touch in the remotest degree the point which it is cited to sustain. It did not relate to a *wharf, nor to anything analagous to a wharf.*

4. *Town of Bowling Green vs. Hobson*, 3, *B, Monroe* 478.

This case is not in point. No question arose as to the rights of riparian owners or as to wharves. It is wholly aside from the point decided in the Haight case, and which it is cited to support. It related to the right of the town ro improve the streets and charge the expense thereof to adjoining lots.

5. *Getner vs Trustees of Carrolton*, 7, *B. Monroe* 680.

The facts are not stated, but the point decided was that "trustees of towns have no authority to convey the streets, alleys and public grounds, and such conveyances pass no title." It is a case in point *in our favor*, since the city of Keokuk has attempted to do that very thing. The court say "the inference is authorized from the plat that the land in contest was intended for public use as a common for the use of the town, affording free access to the river, for lading and unlading boats," but *what* the plat contained is not stated.

6. *Trustees of Marysville vs. Boon*, 2, *J. J. Marshall*, 224.

A ferry case, involving the question of forfeiture of ferry franchise by *non user*. Also, whether the trustees of the town should have been granted a *free franchise*. Nothing about *wharves, stteets* or *riparian rights* in the case.

7. *Kennedy's heirs vs. Trustees of Covington*, 8 *Dana* 50.

The plat of Covington, made and recorded by the original peoprietors, designated the *locus in quo as a common for the use and benefit of said town*, but the proprietors reserved to themselves and their

heirs and assigns "*the ferry rights*." Held that the town had no right to a ferry landing or privilege. No question about *wharves* in the case.

8. *Barclay vs. Howells, Lessees*, 6 *Peters*, 498.

Here the question was whether certain ground along the river in Pittsburg had been dedicated as a *street*, but there is no decision that its dedication as a street would authorize its use as a wharf. It was not necessary to discuss or decide that question, for it was clearly proven that the authorized agent of the original proprietors of Pittsburg represented, when laying out the town, "that the street to low water mark should be for the use of the citizens and the public forever;" also, "that Water street should be left open to the river's edge at low water mark for the use of said town; that they, the citizens, might *use the same as landings, build walls, make wharves, or plant trees, at their pleasure*." (10 Curtis, 205.) The court held that these declarations might be proven, and were binding upon the original proprietors, and amounted to a dedication of the *locus in quo* for a street. There was no question made as to whether it was a street or a wharf. The whole case turned upon the question whether it had been dedicated as a street.

These are all the cases cited to sustain the Haight case on this point.

It is clear that the *locus in quo* in this case was never dedicated for wharf purposes, and that a dedication for street purposes did not authorize its conversion into a wharf.

III.

The court below held that, assuming the ground in controversy to be a wharf, the building erected by the packet company, and known as the packet depot building, "is a reasonable use of the ground as a wharf or levee and does not infringe the plaintiff 's right."

This is, I am sure, an error. The building in question is described in the courts finding, and the contact with the city under which it was erected is set out in full. It is a permanent structure, standing exactly in front of plaintiff 's lots, and covering precisely the 100 feet front which belongs to him. It is in the *exclusive* possession of the packet company and for its use that company pays the city a consideration.

If the city can lease this particular portion of the wharf (if it is a wharf) to one corporation and give the right to erect this building it can of course lease other portions to other companies or individuals for other buildings, and thus not only cut off the lot owners from the navigable water, but allow the use of a public wharf to be monopolized by a few persons. Let it be remembered that the dedication of this ground is in *writing, is express* and is for *street* purposes. Now if we assume that a street may be used as a wharf it must certainly be with this limitation, that the use must be such as *is common both to a street and a wharf.*

We know the premises were dedicated as a street and surely we cannot presume that by this dedica-

tion it was intended to authorize the erection of permanent buildings thereon. This clearly was not included in the idea of a street.

But even an *express* dedication for wharf purposes is a dedication to the *public*, and premises thus dedicated cannot be devoted to the *exclusive use of a single ceroporation.*

The contract between the Packet Company and the city under which this building was erected provides among other things as follows:

"That the party of first part (the city) for the consideration hereinafter mentioned, does hereby lease, demise, and let unto the second party the following described real estate, to-wit: (describing it) and to be privileged, authorized, and permitted to erect there on a comely building for a depot, &c." The said lease provides further that the public shall graciously be permitted to pass with "teams, wagons, and all other kinds and descriptions of vehicles, and of persons, *along the space outside the depot.*" Need we discuss before this court the proposition that this is a diversion of the premises from their proper uses either as a street or wharf?"

The right to erect a building on land is a mark of title and of exclusive enjoyment, and can only be derived from a grant. Cartelyon vs. Van Brundt, 2 Johnson, 361.

It is not claimed that there was ever a grant to the city of the right even to construct a wharf, much less to erect this building.

If the ground was ever dedicated for a *public wharf*, as claimed, it was not dedicated to the city of Keokuk, nor to any one packet company, but to all who navigate the river. And I maintain that any attempt on the part of the city, under the pretense of regulating a public wharf, to give any exclusive privileges therein, to one company over all other companies and persons engaged in commerce, is necessarily void, as being unauthorized by the dedication. That the contract under which the packet company attempts to justify its possession of the building in question is uttearly void, for the reason here stated, was distinctly decided in Ill., &c., Canal Co. vs. St. Louis, 2 Dillon. (See remarks of Dillon, J., page 84, *et seq.*)

By its contract with the packet company the city undertook "to make a lease of the property to private individuals for a fixed period, incapable of determination by the city, at its will;" and thereby (assuming that the land is a wharf) the city surrendered "its control" over fifty by one hundred feet "of the wharf property." The contract is, therefore, null and void, as held in the case last cited, page 87, *et seq.*

By said contract the city of Keokuk undertook to delegate to the packet company powers over the wharf (if it be a wharf) which are not copable of delegation. (*Ibid.*)

It was held in the case last cited that the city of St. Louis might itself erect an elevator upon the

wharf, but could not contract with a private corporation to erect such a building and control and use it absolutely for a fixed period. Assuming that a depot building, such as the one now in question, is no more unlawful than an elevator, we say that this decision is, under the facts in this case, decisive in our favor. It is impossible for the court to hold the ordinance of St. Louis, under which it was proposed to erect the elevator, to be void, and the contract in this case, under which the packet depot was erected, to be valid. It appears, however, that the council of the city of St. Louis were too well informed to suppose that they could give any exclusive rights upon the levee or wharf to any one packet line, for they provided in the ordinance that "the elevator hereby authorized shall be used only as a public grain, produce and package elevator, for the storage, loading and unloading of all grain and merchandise which shall be tendered, without discrimination," &c. It is a self-evident proposition that whatever a city may do in the way of regulating a public wharf, must be done for the public, in the interest of the whole public, and not for the benefit and advantage of any individual or corporation. In the light of this rule, and of the decision in the St. Louis elevator case just cited, we ask the court to read the contract between the city of Keokuk and the Keokuk and St. Louis Packet Company under which the building in question was erected.

While I am well satisfied that the court must hold that these premises were never dedicated for

wharf purposes, I am equally well convinced, that the defense would utterly fail, even if the ground was a wharf.

I desire here to add a few words concerning the St. Louis elevator case, to which I have already several times referred. The court held the ordinance of St. Louis to be void, because it proposed to surrender a portion of the public wharf to the control, for a term of years, of a private corporation. The contract under which the packet company claims in this case is void, for the same reason. This is enough for all the purposes of this case. If that contract was unauthorized and void, then the building is an unlawful structure, and has no right there, the company is a trespasser and plaintiff must recover. The court, however, said that the city of St. Louis might authorize the erection of a grain elevator on the wharf under proper restrictions. I might accept this as the law, applicable to the land in Keokuk, where the packet depot stands, and it would not affect our right of recover. But I note, that the facts in the St. Louis case, were, in several respects materially different from the facts in this case.

(a) The St. Louis case did not present any question as to the rights of riparion proprietors.

(b) The owners of the adjoining lots, in that case, had by written deed expressly dedicated the *locus in quo* for a public wharf.

(c) The elevator proposed to be erected was for the benefit of all persons, on equal terms and without discrimination. It was of such a structure that the court spoke, and the reasoning could not apply to a private depot building, for the exclusive use of one company.

(d) The whole opinion in the St. Louis case proceeds upon the assumption that the fee of the ground had been irrevocably, expressly dedicated for wharf purposes.

In all these respects, the facts in the two cases are materially different. They are indentical as to the character and terms of the contracts under which the right to erect buildings was claimed.

IV.

The decision of the court below in, so far as it was adverse to plaintiff in error is erroneous in this, that it ignores, and in effect destroys his rights and property *as riparian proprietor*. The court below held that the defendants in error, under license from the city might rightfully put *ten Railroad tracks and one large substantial building directly between the front of plaintiff's lots and the Mississippi river*, and thus effectually cut him off from his river front.

This is in direct conflict with the decision of this court in the two important cases of Dutton vs. Strong, 1 Balck 1, and Yates vs. Milwaukee, 10 Wall., 497.

In Dutton vs. Strong it was held that the right to construct wharves, quays, piers and landing places, for the loading and unloading of vessels, belongs to the owner of the adjacent land, who may build out to the line of navigability. Will it be claimed that this right can be taken from the riparian proprietor, and conferred upon a private corporation without his consent and without compensation?

But Yates vs. Milwaukee is still more emphatic in announcing the doctrine that the riparian proprietor cannot be in this manner dispoiled of his property and his rights. In that case this court said.

"But whether the title of the owner of such a lot extends byond the dry land or not, he is certainly entitled to the rights of a riparian proprietor, whose land is bounded by a navigable stream; and among these rights are *access to the navigable part of the river from the front of his lot*, the right to make a landing wharf or pier *for his own use*, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever these may be. This proposition has been decided by this court in the cases of Dutton vs. Strong, and the R. R. Co., vs. Schurmeir, just cited * * * * This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, *it cannot be abitrarily or capriciously destroped or imparied. It is a right, of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.*"

In this case, also, the legislature of Wisconsin had conferred upon the city of Milwaukee authority to establish dock and wharf lines on the bank of the Milwaukee river. It was, nevertheless, held that the city could not interfere with the wharf erected by plaintiff, when it was not in fact an obstruction to navigation.

It is evident that the legislature of Iowa never contemplated the destruction of the riparian rights of lot owners on Water street in Keokuk, in order to make a wharf for the very act which authorizes the city of Keokuk to construct a wharf requires *payment to be made for all private property taken for that purpose.*

The act in question was passed in 1853 as an amendment of the charter of the city of Keokuk and the 7th section is as follows:

"Sec. 7. The said city council of Keokuk shall have the power to establish and regulate wharf or wharves in said city, and more prticularly to use the whole of Water street for said purpose, and, to fix the rates of landing and wharfage of all boats, rafts, water crafts, goods, wares, merchandise, produce and other articles that may be moored at, landed or taken from any landing, wharf or wharves that have been or may be hereafter established by said city.

And in case private property is taken for public use, under the power herein conferred, then the damage and benefits shall

be assessed, collected and paid over in the manner provided in the section in reference to streets, alleys, &c." (Acts of 1853, page 134.)

Angel on Tide Waters, p. 171, lays down the doctrine for which I contend as follows:

"Riparian proprietors, it appears to be well settled, cannot be cut off from the water, against their consent, by any extraneous additions to their upland."

And the author quotes, p. 172, from a decision of Mr. J. McLean, in reference to the Ohio river, (which he puts on the same footing as navigable tide waters), in which it was said:

"It is enough to know that the riparian right on the Ohio river extends to the water, and that no supervening right over any part of this space can be exercised or maintained without the consent of the proprietor. * * * *The State cannot, either directly or indirectly, divest him of any one of these rights except by the constitutional exercise of the power to appropriate private property for public purposes*; and any act of the State short of such an appropriation, which attempts to transfer any of these rights to another, without the consent of the proprietor, is inoperative and void, *and can afford no justification to the grantee against an action of trespass.*"

If, therefore, in this case, the State had authorized the city to fill in the made ground, it would not confer any title upon the city, but the ground so

added would be treated as added for the benefit of plaintiff, and as his property. This is necessarily so, for otherwise, he would be cut off from the river, and his riparian rights would be destroyed; and this, it is held, cannot be done. The State cannot "directly or indirectly" divest the owner of his riparian rights without making him compensation.

And this doctrine is adhered to by the Supreme Court of Iowa.

In *Kraut vs. Crawford*, 18 *Iowa* 553, it was held that a grant of land bounded on one side by the Mississippi river, "will at least extend to the water so as to give the grantee under all circumstances, *the full benefit of the river front*." The Court said, "once a riparian proprietor, always so, because accretions, or newly formed ground belong to such proprietor *jure gentium*, and because the government *cannot afterwards grant such accretions or newly formed ground to another*." And again the Court said that "whether the defendant had or had not title to the *locus in quo*, (assuming it to be below high water mark,) we are of opinion that the government having sold the land to the defendent, referring to a plat which bounded the land by and upon the river, *cannot by any subsequent action or grant to another, cut off the defendant's right to the full benefit of his river front, or deprive him of any of the incidents of riparian proprietorship*, and this, although the land thus subsequently granted, was afterwards newly formed or elevated above the river by alluvion, and lies outside of the meander line, and between it and the present edge of the water."

In conclusion I submit that this case presents in strong light, the evils likely to result from establishing the doctrine announced by the court below, upon the points I have considered. Here is the owner of two lots fronting upon the Mississippi river,—their chief value evidently consists in their river front. He bought them, knowing that there was a *street a public highway* between him and the river, and nothing more. The city has assumed to authorize the laying of ten railroad tracks between him and the river. If ten, why not twenty, or forty? It has assumed to lease 50 by 100 feet of the space, to a corporation for its exclusive use for ten years with authority to erect a building thereon. If this lease is good for this portion of the space and for ten years, why may not the city lease a larger portion for a longer period?

If the present lease is good it may be renewed for another term on the same terms.

In a word if the judgment of the court below on thses points is the law, it amounts to a confiscation of valuable property.

I do not think it necessary to diecuss the question as to the railroad freight depot. That stands within the original street, and it is not claimed that it has any connection with river commerce. It could just as well have been put in any other street as in Water street.

The court below was unquestionably right in holding it to be an unlawful structure upon plaintiff's ground.

Respectfully submitted,

GEO. W. McCRARY,

for Plaintiff in error.

Supreme Court of the United States.

OCTOBER TERM, A. D., 1876.

HIRAM BARNEY,
Plaintiff in Error,
vs.
THE CITY OF KEOKUK, AND OTHERS,
Defendants in Error.

No. 958.

Reply to Arguments for Defendants in Error.

GEO. W. McCRARY,
Attorney for Plaintiff in Error.

R. O. POLKINHORN, Printer, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1876.

HIRAM BARNEY,
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Defendants in Error.

No. 958.

ERROR TO CIRCUIT COURT UNITED STATES, FOR DISTRICT OF IOWA.

Reply to Arguments for Defendants in Error.

I.

Defendants' counsel argue at great length to show that there was a statutory dedication of the *locus in quo* vesting the fee in the City of Keokuk. Upon this point they seek to reverse the decision of the court below. The points made upon this branch of the case, in the opening, are not answered. They are—

1. That the City of Keokuk was never laid out and platted in accordance with the act of 1839; and

2. That if this had been done, it would not have vested the fee in the corporation.

The single point upon which the court below rested its decision, viz., that *all* the proprietors did not join in making and recording the plat, is conclusive. Galland

acted in making and recording his plat either for himself alone, or as one of the five trustees of the New York Company. If the former, he represented no interest whatever; if the latter, he could not represent even the undivided interest of his company, because the articles of association of that company provided that the five trustees, or *a majority of them*, should lay out towns. (Record, page 28.) Besides, if the five trustees had all joined, they would have been powerless to bind the proprietors, for their principal, the New York Company, was only one of many proprietors, all holding undivided interests.

It is shown in the opening that the town plat act of 1839 was not complied with by Galland in making his plat of Keokuk.

That act was first adopted in Michigan, and was carried into the statutes of Wisconsin, Iowa, and Minnesota without substantial change. It has been the subject of judicial construction by the courts of all these States, and has never been held to vest the fee of streets in the corporation, but exactly the contrary has been uniformly held. A "*donation* or *grant* to the public, or any individual, religious society, or any corporate or body politic, *marked or noted as such* on said plat or map," is a sufficient conveyance of the fee to the public. But the marking of a strip of land as a street, on such plat or map, is not a grant or donation. (10 Minn., 104.)

See the following cases as to the construction of this act.

People v. *Beauhein*, 2 Doug. Mich., 256.
Baker v. *Johnston*, 21 Mich., 319.
Gardner v. *Tisdale*, 2 Wis., 153.
City of Milwaukee v, *R. R. Co.*, 7 Wis., 85.
Kimball v. *City of Kenosha*, 4 Wis., 221.
Goodall v. *City of Milwaukee*, 5 Wis., 32.
Ford v. *R. R. Co.*, 14 Wis., 663.

Hegar v. *R. R. Co.*, 26 Wis., 624.
Pomeroy v. *R. R. Co.*, 16 Wis., 640.
Schuermier v. *R. R. Co.*, 10 Minn., 82.

It will appear by a reference to these authorities that in all three of the States it has been uniformly held that the platting of a town and the recording of the plat by the proprietor, in strict accordance with the terms of the town plat act, which is alike in all the States, and the same as the Iowa Act of 1839, does not vest the fee, but only the use of the streets, in the corporation. Also, that cities and towns in those States cannot grant to railroad companies the right to lay down their tracks in the streets of towns and cities, without compensation to the adjoining proprietor,—the owner of the fee. Cases cited by counsel arising in Ohio, Illinois, and in Iowa, after the code of 1851, are not in point, because they arose under statutes materially differing from the one in question. All the Iowa cases cited on the other side arose under the code of 1851, and not one of them under the act of 1839.

It is suggested that Galland was a proprietor because he held stock in the New York Company; but he was at most only the owner of a small interest in the company, while the company itself only held an undivided interest in the land. It is further said, that he was an owner in severalty, having received a conveyance of lots in block 4; but the record shows that the conveyance to him of these lots only gave him an undivided interest, which it is true, became a full title, when his grantors afterwards acquired it, but which at the time his map was executed, was only an undivided interest. *Barney* v. *Miller*, 18 Iowa, 464. Besides, the ownership in severalty of one or two lots would not have made him the proprietor of the whole town site.

It matters not whether the New York Company was a corporation or a partnership. In either case, the real estate belonging to that company could be conveyed only by the company itself, or its duly authorized agent or attorney. Galland had no authority to bind the company. The trustees, of which Galland was one, were declared by the articles of association to hold as "joint tenants and not as tenants in common." (Record p. 27–8.) A joint tenant can alienate nothing besides his own interest. (Washburn on real property, p. 553.) The general law of partnership relating to the powers of the partners over the partnership property and business, has no application here. It has never been held that where real estate is vested in a firm, one partner can convey the whole, without a power of attorney from his co-partner. There was no title of record in the name of Galland, but it was in the name of five trustees of which he was one. Power in him to convey could not be presumed,—his authority must appear.

II.

It is said that the soil of the Mississippi river below high water mark was never included in the half-breed tract, and was not involved in the partition suit; that the half breed tract being bounded by the river extended only to high water mark. In other words, it is claimed that the city by filling in a few hundred feet along the margin of the river, has cut off the riparian proprietors and left them without a river front, thus destroying or taking valuable property and rights without compensation.

If, on the other hand, the made ground has acquired the same character as the land of plaintiff, to which it has been added, as is conceded by some of the defendants, then the fee is in him, and defendants must show

by what authority they use it as a street and a wharf. The city certainly cannot add ground to a man's land, and after it has thus become his property, enter upon it and appropriate it to its own use without making compensation.

1. That an adverse and hostile claim, or right, cannot be interposed and maintained between the land of a riparian proprietor and the water, without his consent, is well settled.

A careful examination of the cases cited by defendants, will show that it is not held in any of them that a riparian proprietor whose title extends to a navigable stream, can be cut off from the water and a hostile proprietorship and possession thrust in between him and the navigable water without his consent and without compensation.

These riparian rights exist to their full extent on the Mississippi river. The fact that it is declared by acts of Congress to be a "public highway forever free," as defendants contend, creates no distinction between it and other navigable waters as to the rights of riparian proprietors.

In the case of *Railroad Co.* v. *Schuremier*, (7 Wall., p. 272) it was held that, although the title of those riparian proprietors on the Mississippi river, whose boundaries are determined by the acts of Congress providing for the survey and sale of the public lands, is limited to the stream, "they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

A similar question to the one involved in this suit arose in the case of *Nichols* v. *Lewis*, (15 Conn., 136)

where the defendant had filled in a portion of the flats between the bank of a navigable river, and the channel of the harbor. The stream was affected by the ebb and flow of the tide, and it was claimed, as in this case, that the legal title to the flats was in the State, and not in the plaintiff. The court say: "As to the first objection, that the land between high and low water mark belongs to the public; this has not been denied. Nor has it been denied that the adjoining proprietor may fill it up, or reclaim it, for the purpose of erecting wharves, not impeding navigation. The defendant, however, insists, that when done, the plaintiffs are not the owners of the soil, but the State is owner. Now, although the State *prima facie* is owner of the shore on the sea coast; yet, we think, that if a wharf is legally erected thereon, it cannot be maintained, that the freehold is not in the hands of the proprietor. * * * * We think the title must be in him, subject to the right of the public to abate it, if it proves a nuisance."

In the case of *East Haven* v. *Hemingway* (7 Conn., p. 203), it was said by the judge who delivered the opinion in the case:

"The right of individuals to use the soil of the shore subject to the paramount rights of the public, so far as my information extends, has never, until now, been disputed. The exercise of it in all our towns bounded on navigable water, and the enjoyment of estates under it, is known to every one. On the death of a land owner to high water mark, his estate in the shore and erections upon it, *has descended to his heirs;* and thus estates have been uniformly held."

2. It has long been the settled law that the shores and adjacent beds of navigable waters may be reclaimed and appropriated by riparian proprietors for the purpose of constructing landings, wharves, and piers. Such appro-

priations of the land are in aid of commerce and navigation, and are favored, and are held to be the *right* of the riparian proprietor, for he is entitled to access to the navigable part of the water from the front of his land. It will hardly be contended that when such landings, wharves, and piers are constructed, they become the property of the public. On the other hand, when land is reclaimed for these purposes, it acquires the incidents of other lands, and ever afterward retains that character. It ceases to be the bed of the river, and ceases to be the property of the State. The riparian proprietor may, also, but on a different principle, acquire a title to the adjacent beds of navigable streams by alluvial formations, and by the gradual recession of the water. It is also held that it may be acquired by grant and prescription. And see *Yates* v. *Milwaukee* and *Dutton* v. *Strong*, and other cases cited in my opening.

3. It is apparent that if we should grant that the same rule applies to plaintiff's land as applies to lands bordering on tide waters and on navigable streams generally, and that plaintiff's title extends to high water mark only, these considerations would not affect his riparian rights as defined in the cases above cited.

The title to plaintiff's land, however, is not derived as ordinary grants of public lands from the United States are; and the language of the Supreme Court in the case of *Railroad Co.* v. *Schurmeir*, which defendants have quoted, was made with reference to the acts of Congress, providing for the survey of the public lands.

The United States never held the absolute title to what is known as the half-breed tract in Lee County, Iowa. They never purchased the Indian title; but in the treaty of August, 1824, it was agreed that it should be and it was reserved for the use of the half-breeds of

the Sac and Fox tribes of Indians. Subsequently, by act of Congress, of June 20, 1834, and before Iowa became a State, all right, title, and interest in and to the reservation, which accrue or revert to the United States, was relinquished and vested in the half-breeds, with full power to transfer their portions thereof by sale, devise, or descent.

4 U. S. Statutes at large, p. 740.
7 U. S. Statutes at large, p. 229.

The parties to the suit of partition claimed under these half-breeds. Plaintiff's grantors, therefore, held all the title of the Indians and of the United States. In the relinquishment by the United States, the land was described, not by section, township, and range, but as lying "between the rivers Des Moines and Mississippi." The Mississippi River was thus made one of the boundaries of the grant. Where a river is the boundary of a grant, the title passes to the center of the stream, unless the bed of the river is expressly reserved or excepted.

III.

The court, rendering the decree of partition, had full and complete jurisdiction of the whole half-breed tract, and of all the interests therein. There were no owners in severalty, and in the nature of the case could not be, since the title was vested in a *tribe* of Indians and their grantees. The tract extended over all lands "between the rivers Des Moines and Mississippi." (7 *Stat. at Large, p.* 229.) It follows, as an irresistible conclusion, that the court had jurisdiction to declare, as it did in the decree, that the "lots fronting on Water street shall extend to the Mississippi river." The tract to be partitioned extended to that river, and its owners were riparian proprietors.

The town of Keokuk never had the fee of the streets, as already shown, and as expressly decided by the Supreme Court of Iowa in Height *vs.* City of Keokuk, 4 Iowa.; confirmed in Milburn *vs.* Cedar Rapids, 12 Iowa. All argument, therefore, upon the assumption that the city held in severalty the fee of the streets is based upon a false premise.

IV.

It is clear that Keokuk was not laid out under the statute of 1839, but by the commissioners appointed by the court on behalf of the numerous proprietors in the partition suit. But assuming that Galland, who was not the proprietor, could, by a compliance with that statute, make a valid plat, and thereby vest the fee in the Corporation, have counsel shown even a substantial compliance with the statute? It is conceded,

1. That the map or plat was not made or certified by the county surveyor.

2. That it was not acknowledged by the county commissioners, nor by the proprietors of the town, but by Galland only.

3. That no certificate of the surveyor was recorded, none having been made.

All these things were required by the statute. It is well settled that a statute prescribing a new mode of conveyance by means of a recorded town plat, must be strictly complied with.

Gardner vs. *Tisdale*, 2 Wis., 153.
People vs. *Beaubein*, 2 Doug., 256.

V.

Riparian Rights.

Counsel have said that "plaintiff claims the fee of Water street on the ground that he is a riparian proprietor." It would be much more accurate to say that plaintiff claims to be a riparian proprietor because he has the fee of Water street—because his lots "extend to the Mississippi river," as declared in the decree of partition.

But counsel deny that plaintiff is a riparian proprietor, and to prove it fall back upon the Galland map, about which much is said upon many points, but nothing in answer to the objection to it made by the court below, *that it did not pass the title* because it was not *made by the proprietor*. Even if Galland had been empowered (as he was not) to represent the whole interest of the New York Company, he could have conveyed, even by the most formal instrument, only about forty-two one hundredths of the property, because that was the extent of the Company's undivided interest as subsequently determined in the partition. And yet it is gravely asserted by counsel that Galland, by his map, conveyed the *whole* of the fee to the Corporation.

It is said in Mr. Ingersoll's argument in this case, p. 41, that "the act of 1848 chartering the city of Keokuk, recognized the fact that a plat of the town of Keokuk was on file in the recorder's office of the county of Lee at that time, and conveyed to the city the right to control the entire river front for landings. It recognized the title of the street as in the city, and licensed it to use the public grounds lying in the bed of the river for public uses. By this act the city was recognized as a riparian proprietor in contradistinction from the lot owners, and vested with the exclusive control of riparian privi-

leges so far as wharves, docks, ferries, &c. were concerned." The act of 1848 will be examined in vain to find any support for this statement. Its material provisions are quoted by the same counsel in his argument on pages 9 and 10. It is true that the act refers to a "plat of said town now on record in the recorder's office of said county," as showing the "boundaries or limits" of the city; but it says not a word about the title of the streets. It probably refers to the decree map, but whether it does or not is wholly immaterial. So far from attempting to authorize the city to take the land in question for wharf purposes or landings, it carefully restricts the city to the use of its own property for these purposes. It says, "the city council shall have power * * * to establish and constitute landing places, wharves, docks, and basins in said city, *at or on any of the city property, &c.*

It is very clear that the original charter of 1848, did not authorize the city to take any private property for use as a wharf or landing. This fact was recognized by the amendment of the charter passed in 1853, which did give this right, but coupled with the usual provision required by the constitution, that property thus taken should be paid for—a provision disregarded so far as the property now in question is concerned (see 12th finding of court below, page 24 of record). This amendment of the charter, approved January 22, 1853, and sec. 7 thereof is partly, but not wholly quoted by defendant's counsel. The whole of the section is as follows:

"SEC. 7. The said city council of Keokuk shall have the power to establish and regulate a wharf or wharves in said city, and more particularly to use the whole of Water street for said purpose, and to fix the rates of landing and wharfage of all boats, rafts, water crafts, goods, wares, merchandise, produce and other articles that may

be moored at, landed or taken from any landing, wharf or wharves that have been or may be hereafter established by said city. *And in case private property is taken for public use, under the power herein conferred, then the damage and benefits shall be assessed, collected and paid over in the manner provided in the section in reference to streets, alleys, &c.*"

The words in italics are omitted in the argument on the other side by Mr. Ingersoll.

VI.

It is said by counsel that the City of Keokuk appropriated Water street for wharf purposes in 1849, and the inference is drawn that this suit is barred by the statute of limitations. The fact is, as shown by the finding of the Court below, that the ground in controversy was not filled in until after 1865, and of course could not have been appropriated as a wharf at an earlier date. And the above quoted section 7 of the amendment to the charter shows that the city was not authorized to so appropriate Water street until 1853, and has never been authorized to so appropriate it without compensation.

The suit was brought in due time; but if the city had wrongfully entered upon the exclusive possession and occupancy of the street, even as early as claimed, the possession would not have been adverse. It being conceded that the ground in controversy is a part of the street, it is clear that the city could acquire no title by occupancy or attempting to authorize others to occupy it.

Dillon on Munic. Corp., sec. 528 to 533, and cases cited.

It is apparent from the record that the defense of the statute of limitations was not pressed in the court below. It is not mentioned in the court's finding, and the facts found show that there was no evidence to support it. No exception was taken upon this point, and therefore it cannot be raised here.

VII.

Defendants' counsel cite authorities to show that the title to the bed of the Mississippi river is in the State; but not one to sustain his proposition that where the bank is extended by either natural or artificial means, so as to raise the bed of the river and make it dry land, it still remains the property of the State. Much less do they attempt to show by any authority that such made land may be by the State or City conveyed to private persons for their exclusive use, and thus the riparian rights of individuals be destroyed. When the original bank of the river is filled in the made ground partakes, not of the nature of the bed of the stream, but of the shore to which it is added. The moment the land was filled in it became plaintiff's land, by whomsoever done. (*Nichols* vs. *Lewis*, 15 *Conn.*, 137; *New Orleans* vs. *The United States*, 10 *Pet.*, 622; 12 *Curtis*, 299.) Atlee *vs.* Packet Company, 21 Wall., 394, is in perfect harmony with this doctrine. The question there was, not whether Atlee could be cut off from the navigable channel and from his river front by filling in, as in the case at bar, but whether by virtue of his riparian proprietorship he could build a pier in the navigable channel.

Much of the argument of counsel on the other side may be answered by the simple suggestion that plaintiff is not suing for the bed of the river, but *for high and dry land* occupied by railroad tracks and buildings. This sets at rest all discussion as to the title to the bed of the river. Counsel seem to realize this, for they do not attempt to answer the conclusive suggestion of the court below, that "the additional ground made by filling in Water street outside of the original water line partakes of the same character as the original street." (Record, page 25.)

Counsel dwell much upon the power given the City of Keokuk by its charter to construct a wharf and to use Water street for that purpose. They omit to state the important fact, which I have already called the court's attention to, that this authority was coupled with a requirement that just compensation be made for private property taken for this purpose. This requirement, being in the charter, it is not necessary to reply further to the claim that the charter authorized the city to take plaintiff's property for this purpose without compensation.

VIII.

Authorities are cited by counsel to show that plaintiff had no right to use his water front for a wharf or landing. If any of the cases cited sustain this doctrine they are manifestly in conflict with *Yates* vs. *Milwaukee*, and *Dutton* vs. *Strong*, decided by this court, for these cases certainly hold that the riparian proprietor possesses this right, unless it is taken from him lawfully and paid for. And this doctrine is not only recognized by, but expressly incorporated in, the amendment to charter of Keokuk of 1853, already quoted. But the point made is immaterial, because the plaintiff has never attempted to use the *locus in quo* as a private landing. His complaint is that it has been exclusively appropriated by the defendants for these and other uses in violation of his rights.

The case of *Tomlin* vs. *The R. R. Co.*, 32 Iowa, 108, while it lays down a doctrine which is in conflict with the frequent decisions of this court, is not in point. It does hold that a railroad track may be laid down along the Mississippi river, *below high water mark*, without the consent of the adjoining proprietor. This decision is based upon the doctrine that the proprietor owning real

estate on the Mississippi river in Iowa owns the fee only to ordinary high water mark. But the ground in controversy in this case is all above and outside of ordinary high water mark. (Record, page 24, point 11 of Court's finding.)

IX.

The counsel on the other side have signally failed to show that the decision of this Court in the Schuermeir case is not in point. It is directly in point and is decisive in our favor, even upon the hypothesis that the fee is in the city. The question was directly presented whether the city or the state could authorize the laying of railroad tracks upon the land in question, which was in the street, and the decision is emphatic, and express that no such power exists even where the fee is in the corpoartion. This decision is based upon the sound and excellent reason which must commend itself to every just mind, that to concede such a power would permit a city to destroy the value of adjoining property by diverting the street from its proper uses.

X.

In arguing that the railroad companies had the right to lay their tracks upon Water street without compensation to the adjoining lot owners, counsel assume that the fee is vested in the corporation, and proceed to show, that under decisions in Iowa, *where the fee is so vested*, that right exists. This I take it as a concession, that if the fee is in the plaintiff, the right claimed does not exist even under the Iowa decisions, which certainly go far enough, and much beyond the ruling of this court in the Schuermeir case. This leads me to recapitulate

briefly the grounds upon which I confidently claim that the fee is in the plaintiff.

1. The title was vested by act of Congress in a large number of half-breed Indians, not as individuals, but as a tribe.

2. Undivided interests were from time to time conveyed by members of the tribe to numerous other persons, but no title is severalty vested in any one prior to the decree of partition.

3. The town of Keokuk was platted in the first place by a person who may, or may not have had, a small undivided interest in the fee, but whose interest, if he had any, was very small indeed, the title at that time still resting in the half-breeds and their numerous grantees.

4. The plat was made and recorded, pending the partition suit, when the property was in the possession of the court, and, therefore, at a time when even the proprietors had no control over it.

5. The plat was not made and executed according to the statute then in force, as I have before shown, and was not made by the proprietors.

6. Under the act of 1839 (town plat act), the plat in question even if duly executed, acknowledged, and recorded by the proprietors, would not have operated as a conveyance of the fee, but only of the use to the corporation, because there is no "donation or grant "of the fee of the streets to the public to the city," marked or noted *as such* on said map or plat," as required by that act, in order to make it equivalent to a conveyance of the fee. (For copy of this act, see Mr. Ingersoll's argument in this case, pages 11 and 12.) If the Galland map had in all respects conformed to the act, the land marked " Water street," would have been conveyed to

the city only (to use the very words of the act) "for the uses and purposes set forth, expressed, or intended."

7. The fee being in the proprietors when the partition suit was instituted, and all the world being parties to and bound by the proceedings therein, (see court's finding, point 7, Record, pp. 19, 20,) it was competent for the court, on behalf of *all* the proprietors, to dispose of the fee of Water street, which it did by decreeing that "the lots on Water street include all the land in front of them to the Mississippi river." (See court's finding, page 21.)

8. Neither the plaintiff nor any of those under whom he claims ever conveyed the fee to the city, and it is, therefore in him, and not in the city.

XI.

I have little to add to what was said in the opening as to whether Water street was dedicated for wharf purposes. If it was so dedicated, it must have been either by writing or in parol. The only written dedication is the map of Keokuk and the endorsements thereon. These dedicate the premises as "Water street." If, therefore, this writing is relied upon, it must be upon the theory that the word street is synonomous with, or at least substantially equivalent to, the word wharf. I submit that this theory cannot be sustained. The distinction between a street and a wharf is clear, and the latter is not included in the former. Has there been a dedication by parol? The facts found by the court below negative this idea entirely. (12th finding, p. 24.) There is no pretense that plaintiff ever consented, or that those under whom he claims, or any of them, ever consented to any use of these premises for any other than street purposes. It is at least doubtful whether a dedication for wharf purposes can be made without writing or by prescription.

Pearsall vs. *Post*, 20 Wend., 111.

But inasmuch as the ground in question has been filled in and converted to wharf purposes by the City of Keokuk "since the year 1865," no question of prescription can arise. (10th finding of court below, page 24.)

XII.

The packet depot building is "a permanent and substantial building, 100 feet long and 50 feet wide, formed of substantial timbers, and is about 14 or 15 feet high." It is occupied by one corporation for its own exclusive use. (Court's finding, point 14, p. 25.) Counsel for defendants insist, and the court below held, that to erect this building upon plaintiff's land, without his consent and without compensation, was "a reasonable use of Water street as a wharf or levee, as incidental to the requirements of navigation and shipping, and does not infringe the plaintiff's rights."

In reply to what defendant's counsel say upon this point, I cite the well considered case of *Gardiner* vs. *Tisdale, et al.*, 2 Wisconsin 153. The facts in that case were strikingly analogous to those in the case at bar. In that case the *locus in quo* had been marked on the plat of the town as "public landing," which is not so in this; but the authority fully sustains the doctrine that the city, by virtue of the power to regulate and control a wharf, cannot authorize its occupation by a permanent building to be occupied and used by a private person or corporation. This doctrine being true, plaintiff must recover, whether the ground was both street and wharf, or only street. On pages 188, 189, the court say: "The phrase "public landing," as used in this case, conveys to our mind the idea of a piece of ground on the bank or margin of Rock River provided for the open and *common use of all persons* in the debarkation of them-

selves or their goods, but not a place to be permanently encumbered with piles of lumber or other merchandize or goods any more than a public highway or street, because the benefits and accommodations to the public which were intended to be conferred would be greatly affected, if not wholly destroyed by any such permanent incumbrance." * * * * * *

"If we rightly construe the precise power over the land parted with by the owner and acquired by the public, in a dedication of a public landing, it is but an easement *or right of transit;* it is no greater privilege in, or power over, the land of another than that given by the dedication of a public highway or street; and it may be supported on the same principle of public policy and convenience. The proprietor parts with no more right to the soil in the one case than in the other; he is entitled to the same remedies for injuries to his freehold in a public landing as in a public square."

The court holds that a public landing may be the subject of dedication, *because* a public landing is in effect a public highway, free for all, and for all alike, and can no more be covered with permanent buildings for individual occupation than the street. But defendants in this case contend that the place in question is a wharf, and therefore more than a street, and that because it is a wharf the packet depot is lawfully there, to which I reply: It is a street only. It can be used as a wharf, if at all, only to the extent that any street on the margin of a river may be; therefore it cannot be encumbered with buildings.

XIII.

The Question of Remedy.

It is argued that ejectment is not the proper remedy for the recovery of the title to the street subject to the public easement. To this, I have several answers to make, either of which I think conclusive.

1. The court below did not pass upon this question, because it was unnecessary, under the practice in Iowa, to do so. The judgment is not for possession, but only for the right, (see court's finding, sixth conclusion of law page 26, and entry of judgment, page 38.)

The code of Iowa, of 1873, abolishes all technical forms of actions (Sec. 2507), and declares that an error of plaintiff as to the kind of proceedings does not cause an abatement or dismissal of the proceedings. (Sec. 2514.)

Sections 3258 and 3259, of said code, being part of the chapter under which this suit is brought, provide, Sec. 3258, "The verdict may specify the extent and quantity of the plaintiff's estate, and the premises to which he is entitled, with reasonable certainty, by metes and bounds or other description, according to the facts as proved.

Sec. 3259. A general verdict in favor of the plaintiff without such specifications entitles the plaintiff to the quantity of interest or estate in the premises as set forth, and described in the petition." (Code of 1873, pp. 524, 525.)

3. No exception was taken to the ruling of the court below on this point. The 6th conclusion of law is not excepted to. (Record, page 26.)

4. If the question were presented, the right to sue in

ejectment for the recovery of the premises subject to the public easement would be sustained.

Adams on Ejectment, page 23, and notes.
Tyler on Ejectment, page 37, 38, 39.
2 *Smith's Leading Cases*, (7 Am. Ed.,) pages 160–1–2.
Doraston v. *Payne*, 16 Mass., 34.
3 *Kent's Com.*, 7th Ed., page 529.
Washburn on Easements, Sec. 213, 214, 215, 223.
Angell on Highways, Chapter 7.

And see an elaborate discussion of the question in *Gardner* v. *Tisdall, et al.*, 2 Wisconsin, 153, and the numerous cases cited by Mr. Carpenter, in his argument on pages 170, 171, 172, and 173.

But I am so entirely clear that this question does not arise upon the record in this case, that I will not discuss it further.

XIV.

The Question of Damages.

The court below gave judgdment for plaintiff, for $600 damages against the defendant, the Keokuk and Des Moines Railway Co., on account of the occupancy and use of plaintiff's ground by its freight depot. This building is in the *original* street, and not on the made ground. (See maps of the premises with the record.)

I do not understand why this question of damages is agreed here. It does not arise. The evidence in relation to it is not certified up, and the facts as to the extent of plaintiff's damage are not found. The defendants did not except upon this point, nor, in any way save it for review in this court. Whatever the rights of the public in the street may be, it is clear that the railroad

company in erecting its depot there was a trespasser, and cannot plead the public easement in its justification. Plaintiff was entitled to damages for the use of the freehold by the raildroad company, and it is to be presumed that the sum awarded him by the court below, was reasonable.

XV.

It is alleged by defendants that while Charles Mason was the owner of one of the lots in question, the city procured from him, *through James L. Estes*, his attorney in fact, a release of his claim to the ground in front of said lot. The power of attorney from Mason to Estes, and the deed executed by Estes thereunder, are embraced in the court's finding, and from these it appears that *Estes had no authority* to execute the release and to make the contract embodied therein. The power of attorney authorized said Estes "to *sell* and convey" certain lots, including the one in question. Under this power Estes undertook, without consideration, to release to the city of Keokuk "the exclusive right to establish and regulate a wharf on Water street in said city, and on the land in front of it to the middle of the Mississippi river, and to fix the rates of landing and wharfage, &c., &c., and also *forever* to use and occupy for that purpose, and the purpose of a public highway, that portion of Water street in front of lots 2 and 5, block 3," &c. [See Exhibits B and C, Record pp. 31, 32.] This was not a *sale* of real estate within the meaning of the power of attorney. *McGregor* vs. *Gardner*, 14 Iowa, 241.

A power to *sell* does not include even a power to *mortgage*—much less a power to *donate* for public uses.

3 Hill, 361.

3 Barb., 128.

Mason received no consideration and never ratified the act of Estes in executing said instrument, but on the contrary repudiated it as soon as he was advised of it. [See Record, p. 24.]

It is not true, as counsel assert, that this court must decide "whether it will subject the city of Keokuk to the loss of its landing." The city can have the premises in question for wharf purposes *by paying for them*, as required by her own charter, as well as by the Constitution. It is suggested that plaintiff's lots are "worthless and unimproved." That they are unimproved is true, and for a reason which a glance at the maps made part of the record will disclose; the whole front extending over a space 100 feet wide and 200 feet long has been seized, appropriated, confiscated, to the uses of the several corporation defendants whose numerous railroad tracks and buildings cover the space and render the improvement of the lots undesirable. That they are "worthless" does not appear and is not true, although it is undeniable that the wrongful acts of the defendants have rendered them much less valuable than they would otherwise have been.

Respectfully submitted,

GEO. W. McCRARY,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1876.

HIRAM BARNEY,
Plaintiff in Error,
vs.
THE CITY OF KEOKUK,
THE KEOKUK & DES MOINES RAILWAY CO.,
THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILWAY CO.,
THE KEOKUK NORTHERN LINE PACKET CO.,
THE TOLEDO, PEORIA & WARSAW RAILWAY CO.,
THE TOLEDO, WABASH & WESTERN RAILWAY CO.,
Defendants in Error.

Error to Circuit Court United States, District of Iowa.

Argument for Defendants in Error.

STATEMENT OF THE CASE.

R. G. INGERSOLL,
Att'y for Toledo, Peoria and Warsaw Railway Co.

Transcript Company, Printers, Peoria, Ill.

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Error to Circuit Court United States, District of Iowa.

Argument for Defendants in Error.

STATEMENT OF THE CASE.

The Toledo, Peoria & Warsaw Railway uses jointly with the Toledo, Wabash & Western Railway Company, railroad tracks on Water street and the public landing at

Keokuk. The plaintiff claims the fee of the street and landing, on the ground that he is the owner of lots five and six in block three, in the City of Keokuk, which front upon Water street in that city. His title is derived through a sheriff's deed, which describes the lots by their numbers and by measurement. His deed conveyed to him only such title as the execution debtors received from their grantors, who deduce title from Marsh, Lee & Delavan, trustees of the New York Company.

The plaintiff has no better title to Water street than the New York Company had at the time they conveyed to Mason, and Higbee and Duryee. If they had no title in the streets, he obtained none by sheriff's deed.

1. As the rule of *caveat emptor* applies to all judicial sales, the plaintiff bought these lots, subject to all the easements, servitudes and defects of title and adverse claims, then existing against the owner to whose rights he succeeded. He must show that the party whose title he bought had the paramount title, and was entitled to the possession of this land as against the public, the corporation of Keokuk and the Packet and Railroad Companies it has licensed to use the streets and landings.

2. He claims title as a riparian proprietor, and on this ground claims damages for the use of the landing and the street. If he does not own the fee of the street and of the bed of the river below the original water line, he is entitled to no damages; for the reason that the depot house and packet building constitute a purpresture upon public ground which the city or the state is entitled to have removed; but this gives no adjacent lot-owner the right to

damages, as he cannot derive revenue from a tort against the state.

If the dedication was simply a common law dedication, the plaintiff is not entitled to the use of the street, or of the landing, for private purposes. He could not build a depot in the streets or on the landing, and lease it, because this would invade the rights of the public, and because he is not entitled to any different use of the street, while it is a street, than other lot-owners are entitled to enjoy.

3. The plaintiff deduces title from the decree in the partition suit; and he can have no greater right in the land comprised in Water street and the levee than the half-breeds had by grant from the United States in 1834.

By the treaty of August 4, 1824 (7 U. S. Statutes at Large, 229), the Sac and Fox tribes of Indians ceded to the United States, certain lands, including those known as the half-breed tract, but reserving the use of that tract for the Sac and Fox half-breeds, and describing it as a small tract of land lying between the rivers DesMoines and Mississippi, and the section of the above line between those rivers; and on June 30, 1834 (4 U. S. at Large, 740), the United States relinquished to said half-breeds its right and title to said lands. The tract of land purchased and relinquished was that between the rivers, and did not cover land below high-water mark on either river. The title to the land underneath the waters of the Mississippi was not conceded to be in the half-breeds, and did not pass to them by any grant from the United States. The word "between," excluded them from all proprietorship over such land covered by the waters of either river.

The half-breeds never owned the land below high-water mark, and so far as the decree of partition attempted to convey to the center of the stream, it is void.

The treaty of September 21, 1832, with the Sacs and Foxes, included the half-breed tract, bounding the tract ceded by it, on the south and east as follows: "thence by the last mentioned boundary, (a point fifty miles from the Mississippi river, on the northern line of Missouri), to the Mississippi river, and by the western shore of said river to the place of beginning," and vested the title in the United States.

That treaty made the western shore of the river the eastern boundary line of this tract, and defined the right of the half-breeds, as reserved in the treaty of 1824, and also defined the reversionary interest ceded by the United States to the half-breeds, by the act of Congress of June 30, 1834.

This is the ruling of the District Court of Iowa, in *Webster vs. Reid*, Morris, Iowa Reports, p. 476.

Water street, as defined by metes and bounds on the Galland plat, and the plat attached to the decree of partition, includes all the land between the lots fronting on the river and the original water line, and is of irregular width, being ninety-six feet wide on the upper side of Johnson street, and one hundred and forty-two feet wide on the lower side of Johnson street and the upper side of lot six; the front line of the lots of plaintiff being fifty feet further from the water line than the frontage of lot one, in block four.

It is marked, on the face of all the plats in evidence, as "Water street," and its limits are shown by the original plats. The width at the corner of lot one, block four was ninety-six feet; at the corner of lot six, block three, the plats filed with the finding show it was one hundred and forty-two feet wide. That was the original width of the street, and the decree of partition did not extend the frontage of the lots to the middle of the channel of the river, but to the river, making that a monument, and also, marking on the map the exact width of the street at the corners of the blocks.

The plat also shows that the decree of partition recognized Water street as a street, and thus confirmed the use of the street in the town of Keokuk. The street cut the lots off from the river, and this fact distinguishes the case from *Yates vs. Milwaukee*, 10 Wall. 504, and *Schurmeir vs. R. R. Co.*, 7 Wall. 287.

The title to the half-breed tract having vested in the half-breeds, by the statute of 1834, their interests became marketable, and speculators bought up their claims. Marsh and his co-trustees purchased sixty-five claims, and laid off the town of Keokuk, and sold lots in connection with Josiah Spalding and other plaintiffs in the partition suit. They recognized the fact that the town had been separated from the rest of the land, and in the partition it was divided into one hundred and one shares, which were separate and distinct from the lands outside of the town plat.

In the partition, Marsh, Lee and Delavan, as a majority of the trustees, were made formal parties, and were awarded forty-two and five-eight shares in the town of Keokuk, and

Josiah Spalding and others, who had sold lots in connection with Marsh, Lee and Delavan, were awarded twenty shares.

Marsh, Lee and Delavan sold lots after the partition, and took mortgages on some of them, which were foreclosed. In 1852, the entire remaining interest of the New York Company was sold to Charles Mason, and by him sold to parties who executed mortgages for the unpaid purchase money. These mortgages were, in some cases, foreclosed. The plaintiff became purchaser of lots five and six by foreclosure, and now claims that he has title, not only to the fee of the street in front of his lots, but to the middle of the river; that he is a riparian proprietor, and as such, has a right to wharf out in front of his lots, and is therefore entitled to a fair annual rental from the Packet Company for the use of the packet house. That in addition to this, no one has any right to place buildings or railway tracks on the street, but as they have been placed, or laid on Water street, he is entitled to a fair annual rental for the time they have been situated in said street; and for this reason he is entitled to damages.

The record does not show that his lots were of any special value, or that the use of the street and landing by defendants had rendered them valueless in any degree whatever.

The testimony taken as to value is confined to the ground in the street and the made ground. Plaintiff claims that the testimony shows the value of the use of the ground, occupied by the Packet Company, is from $250 to $300 per annum; that of the ground occupied by the Keokuk & Des Moines R. R. Co. is from $300 to $500 per

annum, and that of the ground occupied by the other railroad companies is from $25 to $50 per annum.

This claim is novel, and based on the theory that a party who holds the naked fee of the street in trust for the public, and has no greater right to the use of the street than any other lot owner, is entitled to annual rentals for an unlawful use of the street. We do not understand the law to sustain such claims for damages, or to presume an implied contract between the trespasser and the trustee of the public.

The case was brought originally as ejectment, the writ served on the Toledo, Peoria & Warsaw Railway Company being in ejectment. The court heard the case as an action of right, and gave judgment under the Iowa statute, but treated the case as a common law case throughout the trial. The Iowa statute is as follows:

Iowa Code, Title XX, Chap. 2, "Sec. 3246. Any person having a valid, subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord, or tenant of the property claimed.

"SEC. 3427. The plaintiff must recover on the strength of his own title." Revised statutes of 1873. p. 524.

Iowa Code, Title XVII, Chap. 2, "Sec. 2529. The following actions may be brought within the times herein limited respectively after their causes accrue and not afterwards, except when otherwise specially declared:

"Those founded on written contracts or judgment of any courts, except those courts provided for in the next

section, and those brought for the recovery of real property, within ten years." Rev. statutes, p. 432.

Treaty of Sept. 21, 1832, (7 U. S. Statutes at large, p. 374,) ceding the following tract of land to the United States: "Beginning on the Mississippi river, at the point where the Sac and Fox boundary line (as established by a previous treaty) meets that river, thence up said boundary line to a point fifty miles from the Mississippi, measured on said line; thence in a right line to the nearest point on the Red Cedar of the Iowa, forty miles from the Mississippi river, thence in a right line to a point in the northern boundary line from the Mississippi river; thence by the last mentioned boundary line to the Mississippi river, and the western shore of said river to the place of beginning."

RIGHT OF WAY.

Code of 1851, Sec. 735. "The county court may also grant licenses for the construction of any canal or railroad or any macadamized or plank road, or any other improvement of a similar character, or any telegraph line, to keep the same up for a period not exceeding fifty years, and to use for this purpose any portion of the public highway or other property public or private if necessary: *provided*, such use shall not obstruct the highway." Iowa Revision of 1860, p. 206,

"An act granting to railroad companies the right of way, in force Feb. 9, 1853:

SEC. 8. Any railroad corporation may raise or lower any turnpike, plank road, or other way, for the purpose of having their railroad pass over or under the same, and

in such cases, said corporation shall put such turnpike, plank road or other way, as soon as may be in as good repair and condition as before such alteration.

SEC. 12. Any railroad corporation may construct and carry their railroad across, over or under railroad, canal, stream or water course, when it may be necessary in the construction of the same. * * * *

SEC. 15. Any railroad corporation shall be authorized to pass over, occupy and enjoy, without payment of damages, any of the school, university and saline or other lands of this state, provided no more of such lands shall be taken than is required for the necessary use and convenience of such corporation.

Iowa Revision of 1860, pp. 218, 219, 220.

RECORDING ACTS.

Iowa Code of 1851, Sec. 1202.

"When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor, to the extent of that which the deeds purports to convey, inures to the benefit of the grantee."

Statutes of 1840, p. 35. Revision of 1860, p. 390.

CHARTER OF KEOKUK.

An Act entitled "An Act to incorporate the City of Keokuk." Approved Dec. 13th, 1848.

SEC. 1. *Be it enacted by the General Assembly of the State of Iowa*, That all that part of the fractional township num-

ber sixty-five (65) north of range four, (4,) west of the fifth principal meridian, in Lee County in this state, and of township sixty-five (65) north of range five, (5,) west of the said meridian in said county, embraced within the boundaries or limits of the town of Keokuk, according to the plat of the said town now on record in the recorder's office of said county, shall be and is hereby declared to be a city, and the inhabitants thereof are hereby created a body corporate and politic, with perpetual succession, by the name and style of the City of Keokuk. * * *

SEC. 3. That the said City of Keokuk shall be, and hereby is invested as the lawful owner and proprietor, with all the real, personal and mixed estate, and all the rights and privileges thereof, with all the property, funds and revenues, and all moneys, debts, accounts and demands due and owing, or in anywise belonging to said city, or which by or under the authority of any former act or acts, have been acquired, vested in, or is or may be owing or belonging to the City of Keokuk. * * *

SEC. 14. That the city council shall have power * * * to establish and constitute landing places, wharfs, docks and basins in said city, at or on any of the city property, and fix the rates of landing, wharfage and dockage of all steamboats, boats, rafts, and other water-crafts, and of all goods, wares, merchandise, produce and other articles that may be moored at, landed on, or taken from any landing, wharf, dock or basin belonging to said city.

SEC. 16. That the city council shall have power * * *; to license and establish ferries across the Mississippi river from said city to the opposite shore, to fix the rates of the same. * * *

SEC. 22. The city council shall have exclusive power to establish and regulate the grade of wharves, streets and banks along the Mississippi River, within the corporate limits of said city.

An Act to amend an Act entitled "An Act to incorporate the City of Keokuk," passed December 13th, 1848. Approved January 22, 1853.

SEC. 7. The said City of Keokuk shall have the power to establish and regulate wharf or wharves in said city, and more particularly to use the whole of Water street for said purpose. * * * *

SEC. 15. The boundary of the City of Keokuk shall extend to the middle of the main channel in front of said city. * *

An Act to record town plats. Passed Jan. 25, 1839.

SEC. 4. Provides that the plat or map, after having been completed, shall be certified by the surveyor and the county commissioners, and every person or persons whose duty it may be to comply with the foregoing requisitions, shall, at or before the time of offering such plat for record, acknowledge the same before some judicial officer in the county where the land lies, and that a certificate of such acknowledgment shall be by the officer taking the same, endorsed on the plat or map, which certificate of the surveyor and acknowledgment shall also be recorded and form a part of the record.

"SEC. 5. When the plat or map shall have been made out and certified, acknowledged and recorded as required by this act, every *donation or grant* to the public or any

individual or individuals, religious society or societies, or to any corporation or bodies politic, *marked or noted as such on said map or plat*, shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered, to all intents and purposes, a general warranty against such donor or donors, grantee or grantees, for his, her or their use for the uses and purposes therein named, expressed *[or intended, and for no other use whatever. And the land] intended to be for the streets, alleys, ways, commons or other public uses in any town or city or addition thereto, shall be held in the corporate name thereof in trust to, and for the uses and purposes set forth, expressed or intended."

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*The words in brackets are left out of the Iowa statute, but are in the Illinois and Wisconsin statutes in force in 1839.

ARGUMENT OF DEFENDANTS.

I.

Was there a statutory dedication of Water street, vesting the fee of this part in front of plaintiff's lots, in the town of Keokuk?

Plaintiff deduces title from the trustees of the New York Company. The city of Keokuk claims title to the fee of Water street, by virtue of the Galland plat, so called, executed and recorded in 1840, twelve years before they deeded the lots in question to Mason, and to Duryee and Higbie, whose interests passed to plaintiff by sheriff's deed. The Galland plat, we claim was correct, was made by a person having legal title in the land, was acknowledged and recorded in accordance with the law then in force, and by virtue of section five of that act, vested the fee of streets in the town of Keokuk.

Marsh, Lee & Delavan were trustees of the New York company, a mere partnership, as held by this court in *Clagett vs. Kilbourne*, 1. Black, 349.

The articles of association show that the partnership was formed October 22, 1836, and that Joshua Aiken, Robert E. Little and Isaac Galland had been acting as agents for the partners in purchasing interests in half-breed lands, and had bought prior to that time interests to the amount of $20,000, and Aiken and Little were authorized to expend $50,000 more. Also provided for the conveyance of the title of the land purchased, or to be purchased, to the five trustees therein named.

The third clause of the partnership empowered the trustees, or a majority of them, to survey sites for towns, villages and cities, "of all of which sites they shall have surveys and maps made and shall furnish each of the parties to these presents with copies thereof;" to employ, substitute and authorize such attorney, or attorneys, agents and clerks as may be necessary to carry out this agreement, and in case of death of a trustee to appoint a successor.

Provision was made for the sale of lands, and after reimbursement to the partners of their purchase money, for division of the lands in severalty, or of the proceeds of the lands; and that assignments of a partner's interest must be endorsed on his certificate of shares, and surrendered to the purchaser to secure a transfer on the books of the company.

As the record shows that Galland was living in 1840, and does not show that he had surrendered his original certificate, he was still a trustee and a proprietor of the town of Keokuk. As such proprietor he was authorized by the law to sign the certificate of acknowledgment of the plat. He was also an owner in severalty, having received a conveyance of lots in block four, just above plaintiff's lots.

As a partner, who had purchased land for the company, and had one-sixth interest in the business of the firm, he had the rights of a partner to bind the firm in all matters connected with its business. The limitations upon the trustees, or partners, that three trustees were required to lay off town sites, did not invalidate the acts of Galland in that respect.

"Any restriction which, by agreement among the

partners, is attempted to be imposed upon the authority which one partner possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons who acquire rights by its exercise, unless they know that such restrictions have been made."

Kimbro vs. Bullitt, et al., 22 How., 266.

The trustees had notice by the record of the Galland plat, that he had signed the plat as a trustee and acknowledged the same. Yet no action was taken by them as trustees disavowing this dedication or attempting to rescind it. Without such disavowal they are bound by his dedication so far as the public is concerned.

The statute in force when the plat acknowledged by Galland was filed for record, did not require that Galland should produce his authority to make and record the plat. So the Supreme Court of Illinois decided under the statute of February 27, 1833, which was of the same tenor as the Ohio and Michigan statutes: "The law does not require, when a town plat is acknowledged, that evidence of title shall be produced. The survey, plat and acknowledgment are acts and evidence of ownership, of quite an unmistakable character.

Waugh vs. Leech, 28 Ill., 492.

Galland acknowledged the plat for himself, as proprietor, and as trustee. The fact of his trusteeship was a matter of record. It was not necessary for all the trustees to sign and acknowledge the plat.

"It is true that in the administration of the trust where there is more than one trustee, all must concur,

but the entire body can direct one of their number to transact business which it may be inconvenient for the others to perform, and the acts of the one thus authorized, are the acts of all and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee. If, within the scope of his agency, he procures an insurance, it is for the other trustees as well as himself. If he does it without authority, still it is a valid contract, which the underwriter cannot dispute if his co-trustees subsequently ratify it. In fact, so liberal is the rule on this subject, that where a part owner of property effects an insurance for himself and others, without previous authority, the act is sufficiently ratified when suit is brought, on the policy, in their names."

Insurance Company vs. Chase, 5 Wall, 514.

But Galland was a partner as well as a trustee, and his acts are to be construed in accordance with the laws of partnership.

"Every partner possesses full and absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members. Nor between the firm and other parties who deal with it in good faith, and without notice, is it a matter of any consequence whether the partner is acting fairly with his co-partners in the particular transaction or not. If he is acting within the apparent scope of his authority, and professedly for the firm, his acts and representations are binding upon the firm in favor of an innocent third party, however grossly

in point of fact, he may violate his duty towards his co-partners."

Pahlman et al. vs. Taylor, 75 Ill., 634.
Walker vs. Clark et al., 8 Iowa, 474.

Apply that rule to Galland's acts. He was one of the persons authorized to lay off the town of Keokuk. The town was laid off in 1837, lots fronting on Water and Main streets were sold by a plat then made to Edward Brishnell in block five; lot six, block four, to Isaac Galland; and lots one and two in block three, to Southwick and wife, and parol evidence shows the plat to have been the same acknowledged and recorded by him. He was still a trustee and an individual owner in the town plat when it was recorded.

These deeds were binding on the New York Company. They had held themselves out to the world as having authority to lay off the town of Keokuk, had platted it and sold lots by the plat, and when they became owners of shares in the town of Keokuk, in severalty, their grantees were entitled to the benefit of the title acquired by them. Their title inured to the public as well as to private individuals.

"Although a tenant in common cannot impair or vary the rights of his co-tenants, yet if he convey a specific portion of the land held in common, or make a contract in regard to it, and on subsequent partition such portion fall to him in severalty, he will be bound by his act."

Cox vs. McMullen, 14 Gratt. (Va.) 82.

It is also true that partition has reference only to those who claim to be tenants in common, and does not adjust

the titles of those who claim in severalty. The town of Keokuk did not claim to be one of the tenants in common, and was not one of the persons to be summoned into court under the partition act.

A railroad company, having a several estate in the parcel acquired for right of way, not an estate in common, in the whole parcel, is not a necessary or proper party to a partition suit.

Weston et al. vs. Foster et al., 7 Met., 299.

This is also true of the public in this case. The streets and public grounds in the town of Keokuk were not claimed by the public as tenants in common, but were claimed in severalty. The town of Keokuk was not then a corporation capable of being sued, and was not, in the contemplation of law, one of the persons referred to by the act of partition. The purpose of the act was to determine the number of tenants in common, the number of shares they owned and to divide the property owned in common, in the half-breed tract, between them. An effort had been made to do this under an act of the territory of Wisconsin, dated January 16, 1838, which was repealed by the legislature of Iowa, January 25th, 1839, and the decree of partition in question was made under "an act to provide for the partition of real property," approved January 4th, 1839. This act made no provision for the settlement of claims in severalty, but only of claims held by the joint owners, and required persons — not corporations, nor the public—to appear and answer.

It is an established rule of this Court, that a decree is not binding on persons not made parties. Parties cannot be brought into court by publication, simply to unknown

owners. And on this ground, the act of January 25, 1839, was declared, by the Supreme Court of Iowa, to be void. "Suit is brought and judgments entered against 'owners' of certain lands. Parties cannot be brought into court in this manner, and judgments cannot be so rendered. These judgments are void, as the Court acquired no jurisdiction, * * they neither bind nor conclude any one."

Reed vs. Wright, 2 G. Greene, Iowa, 38.

The Supreme Court of the United States affirmed the same principle in

Webster vs. Reid, 11 Howard, 460.

To the same effect are:

Rosencrantz vs. Rogers, 40 Cal., 491;
Kentucky S. M. Co. vs. Day, 2 Sawyer, 472.

The partition suit did not affect property held in severalty, and which had never been possessed by the half-breeds. This was distinctly held by this Court in *Marsh vs. Brooks*, 14 How., 524, where the Court held that the Reddick claim, in the half-breed tract, was older than the half-breed title, set up by Marsh, Lee & Delavan. By the same rule, the soil in the Mississippi river below high water mark, was never included in the half-breed tract, and never became a subject of transfer or partition. The state, which had the title to the river-bed, was not a proper or necessary party to the partition suit, and was not made a party, nor bound by the decree.

The plat, as we have shown, was made by Isaac Galland, as trustee and proprietor, and for other proprietors. He owned lot 6, in block 4, in severalty, and his title to

that lot was sustained by the Supreme Court of Iowa against the grantee of Marsh, Lee & Delavan, Charles Mason, who purchased of the trustees all the land they had not previously sold and conveyed within the half-breed tract. By their deeds in 1837, they had conveyed to Galland and others lots fronting on Water street, with all the rights, titles and appurtenances thereto belonging, one of which was Water street as a street, comprising all the land in front of blocks 3, 4 and 5 to the river. These deeds were subsequently recognized by Marsh, Lee & Delavan in their deed to Charles Mason, which forms part of the chain of title of plaintiff in error. The deed sold and conveyed "all and singular the right, title, interest, property and estate of the parties of the first part, of, in and to all of those lands *not heretofore sold and conveyed by them*, known as the "half-breed tract," or the half-breed Sac and Fox reservation, situated in the County of Lee and State of Iowa, and especially all and singular the lots and parcels in said half-breed tract, particularly described as follows:" and then follows the description of lots in the City of Keokuk.

The dedication by Galland was binding as to him, and this deed did not, and could not, convey to Mason the one-sixth interest in the streets of Keokuk, which had vested in the corporation. The conveyances to plaintiff in error described the lots as "lots five and six, block three, Keokuk," as shown by the finding of the court. The deed does not specify that the lots extend to the river, and must be held to cover simply the ground, 50x100 feet, specified on the face of the plat.

The Supreme Court of Iowa, in *Barney vs. Miller*,

18 Iowa, 460, and reaffirmed in *Barney vs. Ivins*, 22 Iowa, 165, held that Mason acquired no title to lots conveyed by Marsh, Lee & Delavan prior to the deed of partition, although at the date of that deed, they had title to but 41-100ths of the whole tract.

Whatever rights Marsh, Lee & Delavan acquired by the decree of partition inured to their grantees, and to the public as well as to individuals. The moment they became owners in severalty of lots five and six, block three, their acquirement of the full fee of the streets inured to the town of Keokuk.

The conveyance of the streets and public grounds of Keokuk was a conveyance in severalty by Galland as a trustee and partner of the New York Company to the town of Keokuk. The plat was made by an owner in fee of the lands, who had legal title to convey the same.

"One tenant in common may transfer to a third person his entire interest in a part of the property held in common."

Lessee of White vs. Sayre, 2 Ohio, 112.

"And whenever upon a fair partition, that part of the property in which an interest had been conveyed should be set off to the party selling or to his grantee, the other cotenants receiving their full share in as advantageous a form as if the conveyance had not been made, the whole ground of objection to the conveyance would seem to fail. See

Varnum vs. Abbott, 12 Mass., 474;
McKee vs. Barley, 11 Gratt., 340;
Robinett vs. Preston's heirs, 2 Rob., (Virg.,) 273;
Johnson vs. Stevens, 7 Cush., 431;
Holcomb vs. Coryell, 11 N. J., 548.

"The only ground upon which such a conveyance can be held inoperative, is the injury it might do to the co-tenants in partition, in the manner already stated.

Campau vs. Godfrey, et al., 18 Mich., 36.

"And if the co-tenants in bringing a bill for partition may ignore such conveyance, and make only the original tenant who has thus sold, a party; still, if the share of the tenant selling should happen to be so set off as to include that in which an interest had been sold, such partition would, according to most of the authorities in which the point has been discussed, inure to the benefit of his vendee by estoppel; since the deed would be good as to him and all claiming under him, if not as to all parties other than the co-tenants who might be injured by it."

Ibid p. 37.

"In Virginia it has been expressly held that such conveyance by one tenant in common of his interest in a part of an entire tract held in common, passes the title of the grantor in such part, not only as against himself and those claiming under him, but as to all other persons except the co-tenants injured by it.

Ibid, 39.

To the same effect are:

Barnhart vs. Campbell, 50 Mo., 599;
Stark vs. Barrett, 15 Cal., 370;
Freeman on Co-Tenancy, Sec. 200-207;
Smith vs. Modus Water Power Co., 35 Conn., 400;
Dall et al. vs. Brown et al., 5 Cush., 292;
Cunningham vs. Pattee et al., 99 Mass., 251.

"But when upon partition, or by conveyance from his co-tenants, or through any other means, the grantor acquires an estate in severalty in the premises so surveyed by him, this subsequently acquired estate vests in his grantee by operation of the previous conveyance. In this proposition all the authorities treating upon this subject seem to concur."

Freeman on Co-Tenancy, Sec. 207 and cases there cited.

Co-tenants in one large tract of land may convert this tract by an agreement express or implied, into several smaller tracts. This was the case with the half-breed tract. The New York company laid off the town of Keokuk. Josiah Spalding and other co-tenants owning sixty-two and five-eighths shares out of one hundred and one shares recognized the division in 1837. This fact was recognized in the petition for partition. It was also recognized by the surveyor of the half-breed reservation, who certified to the town plat as a plat of the "town reservation."

Both the plaintiffs and defendants in the partition suit set out their respective interests in the town of Keokuk, and they are estopped from denying the fact that the town had been severed from the remainder of the tract.

This was the case in

Primm et al. vs. Walker et al., 38 Mo., 96, 98,

where an addition to the City of St. Louis had been laid out by one tenant in common, who made a statutory dedication of the addition which was recognized by his tenant in common, who recognized each lot as a separate parcel. The plat was held to be binding on both.

We have shown the authority of Galland to make the plat, and if the plat is in form in compliance with statute, there can be no question that there was a complete statutory dedication of Water street.

1. It was made by one of the co-tenants, and a person having an interest in the soil.

2. It designated the land to be sold from that granted for public use, and designated the streets by name, including Water street.

3. It was a correct survey, as proved by the certificate of the surveyor, and by the fact, that the face of the plat corresponds with that adopted by the commissioners of partition, and with the "town reservation," marked on the survey of the half-breed tract. It was a substantial compliance with the law, even if not certified to by the county surveyor.

4. The certificate of the surveyor of the correctness of the map, and the acknowledgment of Galland and the certificate of acknowledgment are endorsed on the map, and recorded with it.

5. It was an essential compliance with the statute, and when recorded in November, 1840, divested the fee from the trustees of the New York Company and vested it in the town.

6. It was made for the common benefit of the co-tenants, and to relieve them from a statutory penalty; and under the recording law of 1840, the plat became notice to all the world that the fee of the town

was vested in the corporation, under the thirtieth section of the recording act of 1840 (Laws of 1840, p. 39.)

Warburton et al. vs. Mattox et al., 1 Morris, (Iowa) 369.

7. As to form, and substantial compliance with the statute, the rule in Iowa in regard to written instruments is that, "where the intention of the grantor can be ascertained with reasonable certainty, the want of minute accuracy of language and the disregard of the usual forms should not render the instrument void."

Meeker vs. Saunders, 6 Iowa, 67.

8. As the statute vested the fee of the streets in the corporation, when a street is laid out on the plat with boundaries, and it is named as Water street and its width given, as in this case, no reservation in the certificate which is repugnant to the face of the plat, can divest the corporation of the fee.

This is the rule in *Hall vs. Des Moines*, 24 Iowa, 241, and *Haight vs. Keokuk*, 4 Iowa, 199.

"That which is indefinite or vague in a deed should always yield to that which appears certain; so where there are two clauses in a deed, in which the latter is repugnant to the former, the former shall prevail."

Wright vs. Cochran, 3 G. Greene, Iowa, 508.

This cures the exception as to Water street, made in the certificate of Galland.

In the city of *Winona vs. Hoff*, 11 Minn., 131, the court

held that where the face of the plat and the certificate were variant as to whether block one hundred and three or block one hundred and four was dedicated as a public square, the face of the plat must control.

"The rule in all such cases is, that whenever there is any doubt or uncertainty it always inures to the benefit of the grantee."

Doe ex. dem. Webb vs. Dixon, 9 East, 16.

When the extent of an avenue is marked on a plan clearly, it is as readily ascertained as if recited in words, and the grantor is bound by the plan.

Rodgers vs. Parker, 9 Gray, 447.

9. The plat, by its recognition of Water street as a street, conveyed to the public the fee of that street for public uses, and conveyed the title of the New York Company. Though the trustees held title to less than half the lots, when they acquired title to the whole, that inured to the benefit of the public. This is the common law rule, and it was incorporated in the statutes of 1840, passed by the territorial legislature of Iowa.

See statutes of Iowa, 1843 p. 35.

This statute was construed in 1844 by the District Court of Iowa Territory, in regard to a mortgage executed by Mattox, who had no title at the time he executed it, but acquired title soon after. The court held that the mortgage was required to be registered, was equivalent to a deed of warranty, and that the title inured to the mortgagor. "If a deed of warranty, therefore, be executed and duly recorded, while the grantor has no title, and full title be subsequently acquired by him, this inures to the benefit of the grantee."

Warburton, et al. vs. Mattox, et al., 1 Morris, 370.

This was re-enacted in the code of 1851, section 1202, and code of 1860, section 2210, as follows:

"When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor to the extent of that which the deed purports to convey, inures to the benefit of the grantee."

10. The map attached to the decree of partition is not a statutory plat, was not made by the commissioners of the county, nor by the proprietors of the town, but is simply copied from the survey of Jenifer T. Sprig, in which he designated and marked it as "Town Reservation." It was not certified, acknowledged, or recorded in the recorder's office of Lee county, in accordance with the law to provide for the record of town plats.

It was not, therefore, notice to the Town of Keokuk, and could not operate to divest it of the fee of the streets.

But this map is a transcript of the Galland map so far as the survey is concerned, making no change in regard to the streets, or their names, so far as the face of the map is concerned. In the report of the commissioners of partition they describe the lots as extending to the center of the streets, except those fronting on Water street, which they extend to the river. This is a mere descriptive averment that as between the co-tenants, they take all the lands comprised within the boundaries of their shares, as against their co-tenants, but does not affect the deeds made by any co-tenants, which conveyed parcels of these shares in severalty. It was not a legal vacation of the streets of Keokuk, but a confirmation of the Galland plat, in fact.

The dedication by the Galland map could not be annulled except by a vacation of the streets according to law, and that vacation must be made before the sale of

town lots according to the plat, or on condition that the rights of lot-owners and of the public are not abridged. There was nothing in the partition statute authorizing the vacation of Water street, or any part thereof, nor empowering the commissioners of partition to vacate the street in any respect or to divest the public of its fee in the streets.

The commissioners of partition were limited in their powers by the statute, had no authority to make a town plat or to vacate it, and so far as they attempted either in the case of *Spalding vs. Antaya*, their acts were void, and the confirmatory decree of the court did not validate them. This is the rule in regard to the location of roads, and is applicable to partition proceedings. See

State of Iowa vs. Molby, 18 Iowa, 528.

But it is claimed that a plat made pending the partition suit, and filed for record pending such suit is void. The converse is the law of Iowa. The Supreme Court in *Hopping vs. Burnam*, 2 G. Greene, 48–49, decided in regard to the priority of an unrecorded deed over the lien of a judgment, that "had the purchase been made and the deed delivered prior to the judgment against Smith, Hopping would have been secure by filing his deed for record previous to the rendition of the judgment."

This decision was made with reference to the recording act of 1840.

This decree is binding only as to the half-breeds and their grantees on the point of title to the shares in the half-breed tract.

The petition of Josiah Spaulding and others, in the partition suit, claims twenty-three and one-third full shares in the tract, and one full share and one-sixth of a share in

"Keokuk, a village situate on that tract." It set out the shares of the petitioners, and made all known share-owners defendants. Unknown share-owners were brought in by advertisement. No corporation was then in existence to take the title to the fee of the streets in Keokuk which the plat conveyed, and the public could not be divested of any right by a publication to unknown owners. The decree of partition was binding only as to those who were parties to the suit, and conclusive only upon them.

Barney vs. Miller, 18 Iowa, 464.

The statute did not confer upon the Court power to adjudicate upon public rights. The Court had no power to adjudicate the ownership of the soil beneath high water mark as against the embryo state, and its decree on that point against the state would have been void. It had no more power to adjudicate the rights of the embryo village or town or city of Keokuk to the fee of the streets laid out on that plat, and so far as the commissioners or the Court attempted to divest the public of the fee in the streets of Keokuk, the decree is void. The Court on agreed facts, found there were one hundred and one half-breeds at the time of the grant to them, and that the parties found by the decree to be plaintiffs and defendants were represented by counsel, except one defendant, whose interests were protected by the Court, and that there were conveyances to them from the one hundred and one half-breed co-tenants.

The bill was not framed to try the title of the public, in the streets of Keokuk, but was framed to try the question of how many shares there were, and who owned them. The decree is *res judicata* as to those persons and as to those matters alone. On this point we refer to *Lessee of McCall et al. vs. Carpenter et al.*, 18 How., 303.

"The language of a decree in chancery must be construed in reference to the issue which is put forward by the prayer for relief and other pleadings, and which these show it was meant to decide * * and general language in the decree will be held down to the two principal parties alone."

Graham vs. Railroad Company, 3 Wall., 704.

THE EFFECT OF THE PLAT.

Counsel for plaintiff in error, argue that if the Galland plat had complied with the law in regard to town plats at the time it was made, that it did not vest the title of the streets in the town of Keokuk.

The act of 1839, Sec. 5, did provide that "every donation or grant to the public * * * or to any corporation or bodies politic, marked or noted as such on said map or plat," shall be deemed a conveyance in fee simple. This language is plain; but if construction is needed, it is proper to construe it in accordance with the decisions of other states from which the statute in question was copied.

As Iowa was originally a part of the northwestern territory, the law of dedication in Ohio is a precedent for the Iowa courts.

The statute of December 6, 1800, enacted by the territorial legislature, required the proprietors of any town theretofore, or thereafter, laid out, to make a true plat, to be recorded in the recorder's office; and provided that the fee of any and all parcels of ground designated or intended to be for public uses, should by such recording be vested in the county, in which such town is in, in trust to, and for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever.

The latter provision was substantially re-enacted in the statute of 1805, for the recording of town plats.

A case under this statute is reported in 18 Ohio Reports, p. 22, as rendered in 1849. The town of Williamsburg was laid off by Gen. Lytle in 1796 or 1797, but the plat was not filed for record then, as no law required town plats to be recorded. The original plat was proven by several witnesses to have been identical with a certified copy of a plat stitched in deed book C. The county recorder testified that he had seen the original of the certified copy in the recorder's office in 1814, and since that time.

The statute of 1800 was superseded by the statute of 1805, which has received a uniform construction from the Supreme Court of Ohio. In the case of *Huber et al. vs. Gazley et al.*, 18 Ohio, 26, it was held that under the first plat made in 1796, the use of public grounds was limited and took effect then, and that the dedicating act was the registry of the plat, which conveyed the title. In a subsequent plat recorded in 1815, Gen. Lytle referred to a former plat as recorded according to law, but provided for a reversion of the public square to himself, in case it was not used for a court house site. The court held that the first plat defined the use of the property, and that no subsequent act of the proprietor could control that use, "and the limitations and reservations in the plat of 1815 are of no force whatever."

In a decision rendered in 1834, *Brown vs. Manning et al.*, 6 Ohio, 304, it was held that "the acknowledgment and record of the town plat, (which is the act of dedication, and which by the operation of section 2 of the statute of 1805, for the recording of town plats [reprinted 22 Ohio Stat., 301] transfers the fee of the land to the county, and

secures its use for the purposes designated on the plat) sufficiently defines the object of the grant, and no declarations or presumed intentions of donors can divert it to a different purpose."

In a later case it was held: "The statute, as will be perceived, does not require any assent on the part of the public to such dedication, before the estate vests in the public, and in that respect differs essentially from a common law dedication." * * A statutory dedication "is intended to operate by way of grant, not estopped. The solemnities of a grant are required to its creation. It is to be acknowledged and recorded as a grant. And then the statute declares its effect as a grant by the words "when so made and recorded, it shall be a sufficient conveyance, vesting the fee in," &c.

Lessee of Fulton vs. Mehrenfield, 8 Ohio St., 444–445.

"Under the law then in force, upon the acknowledgment and record of the plat, the fee of the streets and public grounds therein specified, *eo instanti*, became and was vested in the public for the uses declared, without any act indicating an acceptance on the part of the public." *Ibid*, 446.

Indiana was laid off as a territory in 1800, but no act in regard to recording town plats was passed prior to February 3, 1809, when Illinois territory was organized. Michigan territory was organized in 1805, being set off from Indiana. Illinois territory included within its bounds the country composing the territories of Wisconsin and Iowa, until April 18, 1818, when that portion was attached to the territory of Michigan. The territory of Wisconsin was attached to Michigan until July 3d, 1836.

The statute in regard to recording town plats, which

apply to Iowa, are those of Ohio, Michigan, Illinois and Wisconsin.

The Michigan statute of April 12, 1827, remained in force until after 1836. It is a transcript of the Ohio statute of 1805, and was construed by the courts of Michigan to have the same effect as the Ohio statute, the court holding. "It also obviated the difficulty met with in some of the cases in the application of common law principles of dedication in regard to the ownership of the fee by providing that, upon compliance with the provisions of the act, this should vest in the county in trust for the designed uses."

People vs. Beaubien, 2 Doug. Mich., 270.

Reaffirmed as to a plat recorded in 1830, in

Wanzer vs. Blanchard, et al., 3 Mich., 15.

These decisions, however, were not rendered until after Iowa was organized as a territory.

The Illinois statute of February 27, 1833, was a transcript of the Ohio statute of 1805, and the Michigan statute of 1827 in regard to the vesting of the fee with the exception that it vested the fee in the town or city instead of the county. The decisions in Illinois have been uniform, that a statutory plat does vest the fee of the public grounds and the streets in the corporation, so laid out. "Under the provisions of this statute, the legal title to the land, embraced by a street, is vested in the corporation of the town or city, for the use and benefit of the public. It is not in the power of the proprietor of the lots to transfer the fee in the street to his grantee. The acknowledgment and recording of the plat has all the force and effect of an express grant. It operates by way of estoppel, and concludes the former owner, and all claiming, through or under him, from

asserting title. It is a solemn dedication of the ground to the corporation, to be held in trust for the uses and purposes of the public. On the recording of the plat, the fee in the streets, *eo instanti*, passes to the corporation. If the plat is recorded, before the town has a corporate existence, the fee remains in abeyance, subject to vest in the corporation the moment it is created. A purchaser only acquires a title to the land included within the actual limits of the lot as designated on the plat. He takes no interest in the street—except in common with the public—the right of passage over it. He is estopped by the solemn act of his grantee from claiming title to the center of the street."

Canal Trustees vs. Havens, et al., 11 Ill., 556.

By the organic law of Wisconsin territory, the laws of Michigan were continued in force until repealed. The Michigan statute of April 12, 1827, in reference to recording town plats, was in force until January 18, 1838, when the legislature of Wisconsin adopted an act which is a transcript, in its essential features, of the Illinois act of February 27, 1833, and the Michigan act of 1827.

The first Wisconsin decision construing this act is *Gardiner vs. Tisdale et al.*, 2 Wis. 184, 185, in which the exact doctrine of the Ohio, Illinois and Michigan decisions is endorsed, the court saying, that the decision *People vs. Beaubien*, 2 Doug. Repts. 256, is perfectly correct, and that the fee did not vest in the corporation of Beloit, in the case at bar, because the plats "have not been acknowledged, and the certificate of acknowledgment endorsed on them, as the act requires, so as to effect by means of the recording of the plats alone a transfer of the title." *Ibid*, p. 185.

This decision was rendered in 1853, and in 1868 was reaffirmed in *Williams et al. vs. Smith et al.*, 22 Wis., 598.

The Iowa statute of January 25, 1839, is the same as the Illinois law of 1833. When it was passed, no decisions in regard to the vesting of the fee simple in the corporation had been made in states carved out of the northwestern territory except the Supreme Court of Ohio; and the statute must be held to have been adopted as construed by that court. The Supreme Court of Iowa has affirmed the Ohio decision in *The City of Pella vs. Scholte*, 21 Iowa, 466, where the act of 1839 and the code of 1851 were held to be the same in effect. This decision holding: "that when a town is properly platted, certified, acknowledged and recorded, such acts amount to a conveyance of the streets, alleys, public squares, commons, &c., to and vest the title in, the corporation or public, for the uses specified and intended."

The same court, in commenting on the act of 1851, said: "It is plain from this language, that such a dedicator parts with all his special property rights in the streets, just as effectually as does an ordinary grantor, with perhaps the exception of a right of reverter to him or his assignee, in case the street should be vacated. In support of this view see *Trustees vs. Haven*, 11 Ill., 554," and cases cited. "After such a dedication, he has no more right to interfere with the street than a stranger."

The City of Des Moines vs. Hall, 24 Iowa, 246.

The opinion of Judge Dillon in this case, reaffirms the opinion of the court in regard to the effect of a statutory dedication under the 5th section of the act of 1839,

and sec. 637 of the Code of 1851, where the court held the legal effect of the statutes is substantially the same, and that, "it is not true, then, that a purchaser of town property, in this state takes a title in the fee of the same to the center of the street upon which it fronts."

Millburn et al. vs. Cedar Rapids, et al., 12 Iowa, 252; *Yost vs. Leonard*, 34 Iowa, 15.

" The legal title to the streets, alleys and other public grounds designated and dedicated upon the plat as easements, vests in the corporation whose jurisdiction over the same at once attaches."

Fulton vs. City of Davenport, 17 Iowa, 408.

"Making and recording the plat operates as a grant of the fee of the land comprised in the streets and alleys to the corporation of the municipality as effectually as would a deed.

"Although the evidence does not show affirmatively a literal compliance, it does show a substantial compliance with the provisions of the statute, and that is all the law requires. In all essential matters an exact compliance is shown.

"Objection is made that Clayton, who made the survey, plat and certificate, was not a county surveyor. After the destruction of all written evidence of his official capacity the presumption in favor of the validity of the acts of a *de facto* officer should be indulged, in the absence of proof to the contrary, it was made by an officer authorized by law to act, either by a county surveyor, or by one licensed by the city under its charter, with the same power as county

surveyors. But, waiving all presumptions in favor of the legality of the acts of the officer acting, the plat and certificate are not necessarily invalid because not executed by a county surveyor. Although made by another surveyor, it may still have all the force of a statutory conveyance of the streets and alleys to the city, in trust for the public. Repeated decisions of this court hold it is the acknowledging and recording of the plat that vests the fee in the corporation.

"It cannot be deemed essential who did the manual labor of making the survey and plat, so they are accurately done. The conveyance derives its validity from the acknowledging and recording of the plat by the owner of the lands. Of this same class is the objection, no corner stone was designated on the plat. * * * * Hence, regarding the plat as having been executed, certified, acknowledged and recorded in substantial compliance with the statute of 1845, it follows the fee of the street and alley designated became vested in the city, in trust for the public.

"Under our statute by the making, acknowledging and recording of the plat of a town, addition or subdivision of lots, the owner of the land voluntarily parts with all his title to the streets and alleys, and transfers it to the corporation. The legal effect is the same as if he had made a direct conveyance to the corporation in trust for the public. All interest in the estate that was in the owner became vested in the corporation. No limitation is fixed to the existence of the trust. It may endure forever. Until the municipality shall elect to abandon the use of the streets and alleys, the former owner has no interest whatever in the land embraced within them—absolutely nothing within

any definition of estate or property, that he could sell and convey. It had all passed to the corporation by the former grant, subject only to the possibility it might revert to him if the contingency ever happened the municipality should ever abandon the trust. Logically it follows, by the grant of the adjacent lot, the grantee takes no interest under his deed in the street or alley, other than what he acquires in common with the public. An easement may pass without express mention, as an incident to the grant of the adjacent premises, but there can be no authority found, either in reason or justice, for the proposition, the fee in one piece of land, not mentioned in the deed, passes as appurtenant to another granted by an accurate description giving it a definite and limited boundary. *Jackson vs. Hathaway*, 15 Johns, 448; *Tyler vs. Hammon*, 11 Pick, 193; *O'Lindar vs. Lathrop*, 21 *Ib.*, 292.

"The principle is, the limits of his lot mark the boundary beyond which the title of the grantee does not extend."

Gebhardt vs. Reeves, 75 Ill., 304–307.

This decision sweeps away the technical objections to the plat made by counsel for plaintiff in error. It also defines the character of the estate conveyed to Mason, by Marsh, Lee & Delavan. They conveyed to Mason, and to Higbee and Duryee, lots five and six, in block three, marked and noted on the plat of Keokuk, as 50x100 in size, and these deeds did not convey any estate in the street.

The effect of a statutory plat is to bar an action of ejectment or for damages. "Having neither the legal title nor the exclusive right of possession, he cannot bring tres-

pass for any injury to the soil or freehold. He has no title to be assailed, no possession to be invaded. A party who conveys away a tract of land in trust, cannot maintain trespass or ejectment for any injury thereto until the purposes of the trust are accomplished, and the title has reverted."

Hunter vs. Middleton, 13 Ill., 54.

But, if the fee passed to the town, as we claim, the plaintiff has no right of possession or right to damages as owner of the street. He has no right of reversion because the street has been used for a purpose not intended in the original dedication. Under chapter 147 of the statutes of 1843, (the town plat act of 1839), "the recording of the map as therein required, operated as a conveyance in fee simple of all portions expressed and intended to be for streets, alleys, ways, commons, or other public uses, to be held in the corporate name of the town or city for the uses and purposes set forth. It may be conceded that ground thus dedicated to public use can be used for the purpose expressed in the act of dedication only, and that the grantor, and even the proprietor of lots abutting may, by injunction, restrain a diversion to any other purpose, resulting in injury to him." *Warren vs. the Mayor of Lyons City*, 22 Iowa, 351; *Cook et al. vs. the City of Burlington*, 30 *Ib.*, 94. And yet it does not follow that the title reverts to the grantor, upon a failure to use the land for the purpose indicated. * * * A reversion necessarily assumes that the original proprietor has not parted with his whole estate or interest in the land, (4 Kent, 8th ed., 372.) How can this be true of a grant which vests the fee simple estate, and operates as a general warranty against the donor?

"The true doctrine seems to us to be, that a dedication, such as the one now being considered, passes the fee from the grantor without any contingent right of reversion, and that any person injuriously affected by a diversion from the uses designated, may prevent the same by injunction."

Pettingill vs. Devin, 35 Iowa, 355–6.

The plat having the original certificates and acknowledgments on it, with the certificate of the county recorder of Lee county, that it was recorded in November, 1840, was sufficient proof of the fact that it was so recorded. That is the rule in regard to other instruments:

"The mortgage being recorded, is treated as a record, importing absolute verity."

Carpenter vs. Mooers, 26 Ill., 162.

"The mortgage, with the endorsement upon it of registration, was a sufficient record for the action of the Court. * * * It was the best evidence, and the record could not have been introduced unless upon due proof of the loss of the original."

Alvis et al. vs. Morrison et al., 63 Ill., 182.

RIPARIAN RIGHTS.

Plaintiff claims the fee of Water street on the ground that he is a riparian proprietor.

The evidence shows that the City of Keokuk in 1848 was recognized as having the exclusive control of the river front, and as having jurisdiction over all the territory comprised in the plat of the Town of Keokuk, on record in the recorder's office of Lee county. This reference is

to a plat legally recorded. The only complete plat introduced in evidence, which was acknowledged and recorded in accordance with the laws then in force was the Galland map. It is not a copy, but the original map acknowledged by Galland as trustee, and has never been vacated by any proceedings in accordance with the laws for the vacation of town plats. It was of record when the decree of partition was made, and there is no evidence that it was removed from the recorder's office until the date of its presentation to the City of Keokuk in 1850. It was under the recording act of 1840 notice to subsequent purchasers. The act of 1848 chartering the City of Keokuk recognized the fact that a plat of the Town of Keokuk was on file in the recorder's office of the County of Lee at that time, and conveyed to the city the right to control the entire river front, and to establish landings. It recognized the title of the street as in the city, and licensed it to use the public grounds lying in the bed of the river for public uses. By this act the city was recognized as a riparian proprietor, in contradistinction from the lot owners, and vested with the exclusive control of riparian privileges, so far as wharfs, docks, ferries, &c. were concerned. Under the plat of record, it had color of title in fee to the streets, and to Water street, and that possession has continued until the present time. The plat recorded by Galland in November, 1840, was on its face a title in fee simple, and Marsh, Lee & Delavan did not bring any action at law or in equity to dispossess the town of Keokuk, or the city, from Water street, or to remove this cloud from their title. Under the statute of limitations of 1840, they would have been barred in November, 1860, but by the code of 1851, were barred on the 1st of July, 1856.

The City of Keokuk appropriated Water street for wharf purposes in 1849, and under the law of July 1, 1851, Marsh, Lee & Delavan could not bring an action of right after July 1, 1856, and Mason as well as Duryee and Higbee were subject to the same limitation, so that at the time plaintiff acquired his title by sheriff's deed to the lots, he bought them subject to the bar, and could not bring ejectment against the city for such use of Water street, or to vest the title in himself. See

Kilbourne vs. Lockman, 8 *Iowa*, 382;
Hamilton vs. Wright, 30 *Iowa*, 480.

The foreclosure sale was not made until 1862, and the bar of the statute of limitations under claim of title adverse to the partition decree, was sustained in the case last quoted, and it can be invoked as successfully in favor of the public as in favor of an individual.

The New York Company never brought any action prior to July 1, 1856, to divest the city from title to Water street, or to assert any right as riparian owners to the river front. They did not by their deed to Mason convey the right to revoke any dedication made in their name, and neither Mason, nor other grantees of specific lots, acquired any right of revocation of the Galland plat.

It is a well settled rule of law that a grantee will be estopped from denying a dedication, by the acquiescence in it of his grantors.

Alvord vs. Ashley, 17 Ill., 370;
Dimon vs. People, 17 Ill., 422;
Godfrey vs. City of Alton, 12 Ill., 35–6–7;

City of Cincinnati vs. White's Lessees, 6 Pet., 439;
Hunter vs. Trustees &c., 6 Hill, 407;
Warren vs. Pres. and Trustees of Jacksonville, 15 Ill., 240.

"The plaintiff here being the grantee of Ewing, he is estopped by Ewing's act and acquiescence in the public use."

"The plaintiff in error is privy in estate with Ewing, and he is bound by the acts of his grantors, and of which he had full knowledge before the purchase."

Rees vs. City of Chicago, 38 Ill., 339.

Plaintiff claims the fee of the made land, on the ground of riparian proprietorship. The Mississippi river was, by law, a public highway. The treaty of 1824, with the Sacs and Foxes, reserved this tract for the use of the half-breeds, to be held as other Indian titles, which simply reserved to them the right to hunt and fish there, simply an use of the land. In 1832, the Indian title was extinguished, and in 1834, the United States, owning the entire half-breed tract, conveyed its reversionary interest in the tract to the half-breeds. No title to the soil below high water mark was claimed by the half-breeds, or was conveyed to them by treaty or statute. While the United States did not pretend to grant the half-breeds any title to the soil beneath high water mark on the Mississippi river, it did claim jurisdiction over this territory, and by an act of March 3, 1839, established the eastern boundary of the territory of Iowa as "the middle of the channel of the Mississippi river," and when the State of Iowa was admitted, the same boundary was recognized. It follows that the right of the State of Iowa to all the land beneath high water mark on the

Mississippi river was not affected by the grant to the half-breeds, and is as full and complete in front of the site of the city of Keokuk as at any other point on the eastern boundary of the state.

"By the American revolution, the people of each state in their sovereign character acquired the absolute right to all their navigable waters and the soil under them."

Martin vs. Waddle, 16 Pet., 307;
Russel vs. the Jersey Co., 15 How., 426.

"The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones."

Pollard's Lessee vs. Hogan et al., 3 How., 312;
Pollard vs. Kibbe, 9 How., 471:
Hallet vs. Bute, 13 How., 25:
Withers vs. Buckley, 20 How., 84:
County of St. Clair vs. Loringston et al., 23 Wall., 68;
Atty. Gen. vs. City of Eau. Claire et al., 37 Wis., 447.

Hence the title of the soil beneath the Mississippi river in front of this grant was not vested in the United States, although by virtue of its natural sovereignty it exercised jurisdiction over these waters as the waters of a navigable river. No title to that soil was conveyed to the half-breeds from whom Barney derives his title. The State owned the soil, and holds it to-day for public uses, below high water mark.

This point was decided in

McManus vs. Carmichael, 3 Iowa, 57, and cases there cited.

Haight vs. the City of Keokuk, 4 Iowa, 213;

Prosser vs. Davis, 18 Iowa, 371.

When the City of Keokuk was organized, its eastern boundary extended to low water mark on the eastern boundary of the State; and it became a riparian proprietor to the soil underneath the waters of the river in front of Water street.

The state conferred upon the city the right to control the wharf privileges at Keokuk, and the landing of boats. While doing so, it retained, and still retains, the title to the land underneath the channel of the river. That, it holds in trust for the public at large, and has never alienated. The Mississippi is a navigable river.

It follows that the rule in regard to the ownership of the soil of the bed of navigable waters governs this case. As held by the courts of Michigan:

"The bed of the stream is public property, and belongs to the state. This is the case with all meandered streams, no part of them being included in the original survey; and the common-law doctrine of *usque ad filum aquæ*, is not applicable to them. The public owns the bed of this class of rivers, and is not limited in its right to an easement or right of way only. So with regard to our large lakes, and such parts of them as lie within the limits of the state. The proprietor of the adjacent shore has no property whatever in the land covered by the water of the lake. The

land under complainant's warehouse and wharf belongs to the state."

La Plaisance Bay Harbor Co. vs. City of Monroe, Walker's Chancery, 168.

In Pennsylvania, "the grants of Wm. Penn, the proprietor, never extended beyond the margin of the river, which belonged to the public, and that the riparian owners have therefore no exclusive rights to the soil or water of such rivers *ad filum medium aquæ*."

Carson vs. Blazer, 2 Binney, 475.

"The case before us requires us only to decide that by the laws of Pennsylvania, the river Delaware is a navigable public river, held by its joint sovereigns in trust for the public; that riparian owners of land have no title to the river, or any right to divert its waters, unless by license from the state. That such license is revocable, and in subjection to the superior right of the state to divert the water for public improvements."

Rundle vs. Del. and Raritan Canal Co., 14 How. 94.

In Massachusetts the title to soil under navigable waters was in the state, and land owners fronting on such waters only acquired the right to reclaim them and build wharves by authority from the state. In *Commonwealth vs. Alger*, 7 Cush., 94, the Supreme Court of that state recognizes the distinction between the *jus publicum* and the *jus privatum*, in regard to navigable waters, saying of the colonists, that: "They had been accustomed to regard the use of the sea shores for navigation and fishing, as *publici juris*, to be held and regulated for the common and general benefit; and this although in many cases the right of soil was vested by

private grant in an individual. They had long been familiar with the practice of the crown to make grants of the *jus privatum*, or right of property in the soil, in the sea shore over which the tide ebbed and flowed, which would warrant the grantee of the crown in erecting thereon wharves, quays and warehouses, for facilitating navigation and commerce, provided such erections did not hinder or obstruct navigation, or become a nuisance. If such a wharf or other erection were such as to interfere essentially with the common right of navigation, it would be held by the common law to be a nuisance, and could not be justified even by the king's grant, unless sanctioned by an act of parliament. These rules and practices were familiar to the minds of our English ancestors at their emigration, and we may presume that the colonial government had them in view when, by a general act, it annexed the sea shore to the upland, and made it the private property of the riparian proprietor. It must have been well understood that all estate granted by the government to individuals is subject, by reasonable implication, to such restraints in the use, as shall make the enjoyment of it by the grantee consistent with the equal enjoyment by others of their several and common rights. When therefore the govenment did by such general act, grant a right of separate property in the soil of the sea shore, to enable the riparian proprietor to erect quays and wharves for a better access to the sea, and by the same act reserved some right to individuals and the public of passing and repassing with vessels, but without defining it, it seems just and reasonable to construe such reservation much more liberally in favor of the right reserved, than it otherwise would be under other circumstances."

Hence it was held that the Act of the Legislature, establishing a harbor line, beyond which private proprietors should not construct wharves, was valid.

Plaintiff in error never had any grant from the state of riparian rights below high water mark. The half-breeds had no *jus privatum* in the bed of the river. They had the right of fishing and navigation, as part of their *jus publicum*. That passed to their grantees; but no ejectment would lie for an invasion of that right. The state owned the soil in front of Keokuk, and when it chartered the city, it made it a riparian proprietor as to the river. It recognized the plat of the town and that the city had the full and exclusive right and control of the wharves, streets and banks in the corporate limits of the city, along the Mississippi river. This act passed in 1848, was a complete and absolute denial of any riparian rights in lot owners of the city, and a grant as against them to the City of Keokuk. The amended charter of 1853 recognized the same principle, and extended the jurisdiction of the city to the center of the channel of the Mississippi river, and in terms authorized the city to use the whole of Water street for wharf purposes. No grant of the fee of the soil was ever made by the state to Marsh, Lee & Delavan, or conveyed by them to the plaintiff's grantors. He has therefore no *jus privatum* in the soil of the river, and none of the riparian rights which flow from a *jus privatum*. As against the state and the city, his grantors were estopped in regard to asserting riparian rights on the 1st day of July, 1856.

This court has recognized the distinction between the *jus publicum* and *jus privatum* in *Atlee vs. Packet Company*, 21 Wall., 394.

Atlee, who owned a mill on the Mississippi river below Fort Madison, built a pier out into the river, and justified his erection on the ground "that at any place where a riparian owner can make a structure useful to his personal pursuits or business, he can without license or special authority, and by virtue of this ownership, and of his own convenience, project a pier or roadway into the deep water of a navigable stream, provided he does it with care and leaves a large and sufficient passway of the channel unobstructed." * * "No case known to us has sustained this proposition, and we think its bare statement sufficient to show its unsoundness."

In the same case, this court recognized the right of cities to control the riparian rights which flow from the *jus privatum* of the state in the soil, holding:

"In all incorporated towns or cities located on navigable waters, there is in their charters, or in some general statute of the state, either express or implied power for the establishment and regulation of these landings.

"The wharves or piers are generally located by lines bearing such relation to the shore, and to the navigable water, as to present no danger to vessels using the river, and the control which the state exercises over them is such as to secure at once their usefulness and their safety. These structures are also allowable in a part of the water which can be used for navigation, on the ground that they are essential aids to navigation itself."

Ibid, 393.

The construction of railroad bridges was also justified

on the ground that they were in every case authorized by the state.

It follows that the City of Keokuk had full authority from the state to wharf out, to build piers, to construct levees, to fill out beyond the original limits of Water street for purposes of a public landing, the title to the soil thus filled in remaining in the state, in trust for the public.

We insist that plaintiff has never been a riparian proprietor. His lot was 142 feet from the high water mark at the time the town plat was laid off in 1840. Water street was recognized as a street at that time, and no use of the street for wharf purposes was reserved to any lot owner. Even under the decree of partition he had the naked fee, subject to the public use of the street for street purposes. In 1846, the State of Iowa was admitted into the Union and the soil below high water mark on the Mississippi river passed to the state, with the right to dispose of the title to any part of said soil in any manner as she may deem proper, subject only to the paramount right of navigation over the waters. In 1848, the control of the riparian rights as to wharfage, levees, &c., was granted to the City of Keokuk.

In its leading features, the claim of plaintiff is similar to that of Weber, in the case of *Weber vs. Harbor Commissioners*, 18 Wall., 67. Weber's grantors had bought water lots of the city, then owning the title of the soil in the harbor, and built a platform on the whole length of the water front. They also constructed a wharf from the center of the platform into the bay. The state, by a subsequent act, created a Board of Harbor Commissioners, investing

them with control of the water front, and with power to abate nuisances.

This Court held that Weber's grantors took whatever interest they had in the water lot, subject to the public control, and that "there is, therefore, no just foundation for the claim by the complainant as a riparian proprietor, of a right to wharf out into the bay in front of the land. He holds, as his predecessors took the premises, freed from any such appendant right. The erection of his wharf, the obstruction to the use of which is the cause of the present suit, was therefore not only an interference with the lawful control of the city over the space occupied by it, but was an encroachment upon the soil of the state, which she could remove at pleasure."

Ibid, p. 67.

In the same case it was held that the act of the legislature creating the harbor commissioners was a public act expressive of the intention of the legislature that the state should conserve her title and interest in the whole water front of the city, and prevented the complainant from acquiring the title of the state, by the operation of the statute of limitations.

Ibid, p. 71.

By the same rule, the state having, in 1848, conveyed to the city a right to use the river front for landing purposes, and having recognized, in fact, the rights of the city under the plat of the town of Keokuk, at the time Mason, Higbee & Duryee bought from Marsh, Lee & Delavan, the lots in question, these parties bought with full knowledge of the public rights, and could not have maintained an

action against their grantors for a breach of the covenants of seizin.

Kutz vs. McCune, 22 Wis., 628.

Lot owners could not wharf out at Keokuk, as the charter of the city of Keokuk gave it exclusive control of Water street for wharf purposes. "The right of the owner of property within a city to use it for any purpose he pleases, is necessarily subordinate to the public interest, and to the exercise of the rightfully granted municipal authority."

City of Dubuque vs. Stout, 32 Iowa, 48.

City of Dubuque vs. Stout, 32 Iowa, 82, 85.

And this is the rule in a city where the lot owners own the fee of the streets, and the city the use. But Barney was never a riparian proprietor. He never owned the right to use Water street, or the part opposite his lots, for wharf purposes. He could not use the street, for he had no right to use it while the fee or the use of the street was in the City of Keokuk. Whatever rights Marsh, Lee & Delavan had in Water street before it was platted, as his sheriff's deed described the property by metes and bounds, by the common law rule, he held only to the center of Water street, and could not interfere with the public use of the street. He acquired his title after the city had taken possession of the street and controlled the landing.

The case of *Den. vs. Jersey Company*, 15 How., 426, is somewhat parallel to the case at bar. The Jersey Company was a grantee of the state to lands under the tide water, which lands it had reclaimed. Russell was a grantee of the proprietors of East New Jersey, and claimed that he owned

the fee to the land beneath the navigable waters, as private property subject to the public use.

The Supreme Court of the United States held otherwise—that "the soil under the public navigable waters of East New Jersey belonged to the state, and not to the proprietors," and that ejectment would not lie.

The question of riparian rights granted by the state has recently been passed upon by the Court of Appeals of New York in *Delaware and Hudson Canal Company vs. Lawrence, Adm'r*, 56 N. Y., 612, affirming the opinion reported 2 Hun., 164.

The corporation enjoined the defendant from constructing a dock or wharf between high and low water mark, on the ground that the plaintiff was entitled to have the stream kept open its full width, for the passage of boats and tugs. The defendant justified under patents from the state for such lands.

The court held "that the defendant's patents from the state of New York gave him title to the soil upon which he was constructing this wharf, as against all other claimants thereto; that such construction being within low water mark, as the referee finds, and for commercial purposes, the structure could not in law be a nuisance or an illegal obstruction, that justified a judgment that it be abated."

"The creek in question is a common highway, equally free to all citizens who desire to use it, and it is under control of state authority as we have shown, and is subject to state regulation, at least so far as the soil thereunder is the soil of the state." (2 Hun., 192, 193.)

The levee and made land contains the wharf and depot of the Keokuk Packet Company, and seven of the railroad tracks, with which the other roads connect. Neither the packet company nor railroad companies pretend to own the fee, but are simply lessees of the city, or are authorized by the state to use this property by special enactments or under the general railroad law.

While the city of Keokuk could so use the river bank and the water of the river, the plaintiff could not do so. *Atlee vs. Packet Company*, 21 Wall., 393, recognizes the right of towns and cities to build wharves and project piers into the waters of the navigable rivers, but denies such right to a person admitted to be a riparian proprietor, unless he has express legislative authority. This is based on the well recognized principle "that it is beyond dispute that the state is the absolute owner of the navigable rivers within its borders, and that as such it can dispose of them to the exclusion of the riparian owners."

People vs. Tibbetts, 19 N. Y., 523;
People vs. Canal Appraisers, 33 N. Y., 487;
Mumford vs. Wardwell, 6 Wall., 436.

The plaintiff makes the same claim adjudicated in the case of *Dana vs. Jackson Street Wharf Co.*, 31 Cal., 120, that he is a riparian owner, and as such has a right to wharf out against his own land; that the wharf, though built by the defendant, inures to his advantage, and that the present right of entry thereon is vested in him and not in the people. But the court held:

"A riparian proprietor on navigable water, has no right at common law to wharf out against his own land. By the common law any erection below high water mark,

without license is regarded as an encroachment and intrusion on the King's soil, which the King may demolish, seize or arrest at his pleasure. (Ang. on T. W., 199.) This shows decidedly that in cases of purpresture the right of entry is not in the adjacent land-owner but in the crown."

The same rule was sustained in a recent case decided by the Supreme Court of Michigan, in which it was held:

That the erection of permanent structures by booming companies in the bed of a navigable stream was a purpresture, unless authorized by the state. "The appropriation by an individual of a part of a public common, may, therefore, be a purpresture; and as it would constitute an invasion of public right, it would be proper that proceedings for its abatement should be taken on behalf of the state.

"But if the appropriation of a part of the stream were presumptively a public injury, the public must be deemed to have waived its right to complain, so far as the appropriation was not unreasonable, when the law permitting the organization of booming companies and regulating their operations was enacted. This is so, because some appropriation is essential to their operations. Nothing can be a nuisance which the public authority allows, especially when the allowance is on public grounds, and made to facilitate the use of that which is common to all. The question of lawfulness in the action of the booming company in enclosing part of the stream for its own purposes, whether it be done by permanent structures or otherwise, must, therefore, necessarily be a question depending upon particular facts; it is a question of nuisance or no nuisance; *in other words, it is a question whether the general public, desiring to avail themselves of the navigable right, are or are not more*

inconvenienced than accommodated. If they are not, the enclosure is not unlawful; if they are, it may be."

Smith vs. Evart Booming Co., 3 Central Law Journal, 788.

The rule as to accretions, as laid down by Blackstone, is that "if the gain be by little and little, by small and impreceptible degrees, it shall go to the owner of the land adjoining. * * * But if the alluvion be sudden or considerable, in this case it belongs to the king." 2 Com., 262. In this country it belongs to the goverment.

But where the state, or its grantee, a city, has filled in a wharf and made land for public purposes, this is not an accretion. "To hold that a change in the channel, by artificial means, would extend the boundaries of the plaintiff's lot, would be as unreasonable as to decide that the removal of the landmarks by which the boundaries of a man's farm were defined, would expand or contract its area."

Halsey vs. McCormick, 13 N. Y., 299.

Where lands had been reclaimed by driving piles into the water and capping the same, and filling up the same, so that the space in the waters of the harbor were totally unfit for navigation, and there was a permanent accretion by artificial and natural causes to a water-lot claimed to be owned by the plaintiff in ejectment, it was held:

"The findings, however, make a case of purpresture, or encroachment, by the erection of a wharf in a public harbor, and not a case of marine increase by alluvion, within the definition of that term, as fixed by the foregoing citation."

Dana vs. Jachson St. Wharf Co., 31 Cal., 120.

The citation referred to is that we have quoted from Blackstone.

"The state is the absolute owner of the navigable rivers within its borders, and as such may dispose of them to the exclusion of the riparian owners."

Hudson River R. R. Co. vs. Loeb, 7 Rob. (N. Y.), 418.

The rule laid down by this Court in regard to accretions, is that, "Before a proprietor can set up his claim to accretions and the like, he must first show that he owns the shore."

Bates vs. Illinois Central R. R. Co., 1 Black, 208.

In that case the land in suit had belonged to the grantee of the plaintiff, but had been washed away, and the court held that the party bought and could have no proprietary rights in the bottom of the lake, and that he took the property in the exact position in which his grantee owned it when he obtained his deed. This is also the rule in *Johnston vs. Jones, et al.*, 1 Black, 209.

Hence if plaintiff's grantees were not riparian proprietors at the time he took title to these lots, no question of accretions can arise.

The same principle was decided in an English railway case, where a railway built its road on made land at a point where low lands of one Bradley had been washed away. The company paid into court the money assessed by a jury for taking such washed out low lands, and the question submitted was whether the crown was entitled to the money as owner of the soil below high water mark, or whether one Bradley, whose ancestors owned the *locus in quo* before it was washed away, should receive it. The Court of

actual property to the public; that the riparian owner by the common law, has no peculiar rights in this public domain as incidents to his estate; and that the privileges which he possesses by the local custom or by force of the wharf act, to acquire such rights, can before possession has been taken be regulated or revoked at the will of the legislature.

"The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark. It was further held, that any damages sustained by the location of the railroad below high water mark, was an incidental injury for which compensation could not be required.

Reaffirmed in *Penn., R. R. Co. vs. New York & Long Branch R. R. Co.*, 23 N. J. Eq., 159.

The Supreme Court of Iowa has uniformly held that the owner of lands abutting on navigable rivers owns only to high water mark.

McManus vs. Carmichael, 3 Iowa, 4.

Reaffirmed in *Tomlin vs. The Dubuque, Bellevue and Mississippi R. R. Co.*, 32 Iowa, 108. The court held: "One of the common law consequences of navigability, as fully shown by *McManus vs. Carmichael*, is that the riparian proprietor, owns the fee of the soil only to ordinary high water mark, and that the proprietorship of the bed of the stream, below ordinary high water is in the state for the use of the public. * * * A careful examination of this case, with the reasoning by which it is supported, convinces us that the conclusions there reached rest upon satisfactory

and solid foundations, and induces us to adhere to it, as a sound exposition of the interesting questions it involves."

The railroad in question had built its track in front of appellant's land which abutted on the Mississippi river for about ten miles, and Tomlin sued for damages on account of being deprived of access to the river. The court below held that the owner of the adjoining land could not recover the value of the land taken for the track, which lay below high water mark; but that he could recover damages arising from such use of such land. The Supreme Court held that he could not: That "the question is, can the plaintiff recover damages for being deprived of access to a navigable river by reason of the building of a railroad along its banks? * * * The doctrine deducible from adjudged cases is, that by the rules of the common law the owner of land along the shore of a navigable river is entitled to no right, either in its shores or waters, as an incident of his ownership, except the contingent ones of *alluvion* and *derelictum*. Hence he is not entitled to damages, for an improvement made along the banks of such river, by the authority of the state, the effect of which is to deprive him of free access to the stream." The opinion then quotes from and concurs in *Gould vs. Hudson River R. R. Co.*, 6 N. Y., 543, and *Railroad vs. Stevens*, Am. Law Reg. for March, 1871, p. 166.

The right of a lot-owner within a city to use his water front for a landing, contrary to an ordinance of the city, was denied in

The City of Dubuque vs. Stout, 32 Iowa, 84.

"The charter confers upon the city the power, and makes it its duty, to establish the wharves, docks and landings, to fix the rate of wharfage and to regulate the stationary anchorage and moorings, of all boats and rafts.

"As in the case of public markets, this grant of power to establish wharves and regulate the stationary anchorage and moorings of all boats and rafts necessarily confers the authority to fix the location and limits of the wharves and landings, and to prohibit the use of any other place for that purpose. The mere power to establish wharves and regulate them, and the boats and rafts choosing to land there, instead of elsewhere, would be 'an idle and useless' power, and would be of no moment toward the good government of the city. On the contrary, if the owner of every lot abutting on the river within the city, not included in any of the public wharves, has the right, notwithstanding the grant in the city charter, to use his own lot front for the landing of his own lumber; he may also permit others to use it for the same purpose, and thus a number of private wharves would be enabled to render the public wharves useless, and destroy their entire benefit to the city and the public."

These decisions show that the owners of lots on Water street have no right to damages for the use of the soil of the state, below high water mark, nor any right to wharf out in front of their lots. The only right incident to such ownership of the adjacent soil is that of alluvion and derelictum—to gain or lose territory by the forces of nature.

But this right of alluvion belonged only to the original proprietor of the Town of Keokuk, and when the town was platted, and the fee or the use of the street vested in the public, the duty of keeping the water line intact, so that the orjginal width of Water street should be preserved, was a complete and absolute waiver of any right to alluvion. Instead of the proprietors having the right to alluvion to compensate for natural losses of soil, they waived it in favor of the public. The dedication, whether statutory or common law, was a contract that in consideration of the

grant to the public, the public should not permit any encroachment upon the street or upon their lots. Hence any structures below high water mark, made upon the soil of the state for wharf purposes, which did not diminish the width of Water street, belong to the state, and not to the adjoining lot-owner. The bed of the river is not appurtenant to the soil of the lot, and does not pass with it, while the structures, whether docks, wharves or permanent filling of the soil to high water mark, are part and parcel of the soil, and title to them only passes by deed from the state.

"There is no ground for saying that the bed of the stream is appurtenant, or that it can pass as an incident of the grant. It is not an easement. It is land. The owner conveys a part of his property with a definite boundary, and the grantee claims the right to go beyond that boundary and take another piece of land, which is probably much larger than the one described in his deed. He does not claim by force of his grant, but by the common law. *

* * The presumption in favor of the riparian owner is only indulged in the absence of any direct evidence of his boundary; it is never used for the purpose of enlarging, qualifying or in any way affecting his written muniments of title, or the limits which they prescribe."

Dissenting opinion of Bronson, J., in *Starr vs. Child*, 20 Wend, 165. Reaffirmed in *Child vs. Starr*, 4 Hill., 374, 375, 376 and 382.

"The plain and simple principle upon which the right of alluvion is placed in the civil law is, that he who bears the incidental burdens of an acquisition is entitled to its incidental advantages; consequently that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods is entitled to the increment which from

the same cause may be gradually annexed to it. This rule, however, did not apply to fields which the Romans termed limited, or *agri limitati.*"

Smith vs. Public Schools, 30 Mo., 300.

The same opinion also quotes from the French Encyclopedia the following: "we must observe, however, that to acquire by right of alluvion, two conditions are necessary: first, that the increase should be made slowly and imperceptibly, in such a manner that it cannot be discovered in what time each part of the alluvion has been formed to and consolidated with the inheritance; second, that the inheritance, by virtue of which the right to acquire by alluvion is claimed, be contiguous to the river, in such a manner that the bed on which it flows seems as it were, to be a part of the same inheritance; for in case it did not bound exactly to the river, and that it was bounded by a causeway, or by a road, the parts left uncovered by the river between its bed and the road cannot belong to the proprietor of the inheritance situated on the other side of the road. Those lands belong to the King in navigable rivers and to the feudal lords in those that are not so. (2 Hall L. J. 327)."

Ibid, p. 302.

In the case of *Martin vs, Livingston*, 6 Martin ——, it was admitted by Mr. Livingston "that if the conveyance to Paeyfore had been of a lot in an established town, the words used in it would not bound the grantee on the water." It was admitted by Mr. Ellery that "to the city belong as necessary appendages its commons and shores; its lots are all bounded by streets, and are sold whether so expressed or not, according to its plan. (6 Martin, p. 134.)

Judge Martin held that the owners of the lots nearest to the river have no part of the bank as accessory thereto.

"These lots were not charged with any of the burdens attending rural riparian estates; the levee, road or street was made or kept in repair at the joint expense of the owner of every lot in the city, the furthest from the water contributing as much thereto as the nearest; no riparian duties are imposed on a lot in New Orleans, either by the law or any clause in its grant."

The same rule was affirmed in *DeArmas vs. the Mayor*, 5 Lou., 132, and sanctioned by this court in *New Orleans vs. United States*, 10 Peters, 718, and *Cincinnati vs. Peters Lessee of White*, 6 Pet., 432.

Section one of "An Act granting to Railroad Companies the right of way," passed January 8th, 1853, enacted that any railroad corporation in the state heretofore organized, or that may be hereafter organized, under the laws of this state, may take and hold, under the provisions contained in this act, so much real estate as may be necessary for the location, construction, and convenient use of their road." Iowa Revision of 1860, 218, Sec. 8, authorized them to use any lands of the state.

This statute granted the use of these lands, the state retaining the title, and it conveyed the right to lay tracks below high water mark and along levees. This is on the ground that the use of the soil is a public use, and not a private use. So where there is condemnation of lands for right of way, the title does not vest in the railway, but in the state. On the failure of the railway company to use the road, it does not revert to the former owner, but belongs to

the state, and may be appropriated by it to another road. * * "The corporation thus condemning and paying for the right of way acquired an easement in the land thus condemned. In the theory of the law an easement thus acquired is so acquired to the public use. Upon no other theory can the power of eminent domain be exercised; it being well settled that the legislature has no power to take the property of the citizen for any but a public use. * *

* In contemplation of law, therefore, when the right of way in question was taken through plaintiff's lands, it was taken by the state for public use, and not simply by and for the private use of the railroad company, in whose behalf it was taken, although the compensation for the property taken was paid by the railroad corporation.

"The easement thus acquired by the railroad company is, therefore, in the nature of a grant from the state for the uses and purposes fixed by law; * * "

Noll vs. Dubuque & B. & M. R. R. Co., 32 Iowa, 69, 70.

It is clear then that no right to enjoin the use of the levee for railroad purposes exists in the plaintiff on the ground of riparian proprietorship. He has no title to the soil, he has no right of alluvion because his legal title is confined to the limits of his lot, and he is under no obligation to keep up the original width of the street, either by yielding a portion of his own lot, or by protecting the shore from encroachments of the current. He has a right only to the use of the street in common with other citizens.

But if plaintiff is a riparian owner, he cannot restrain

the use of the levee for railroad purposes. That question was decided in

Ingram et al. vs. The Chicago, Dav. and St. Paul R. R. Co., 34 Iowa, 252.

The court held the land on which the tracks were laid was a part of the street, or beyond the street, and owned by others or held by the city for public purposes. "In neither case can plaintiff restrain its use by the railroad company, authority therefor having been had from the city or the owners." That the laws of congress in regard to the navigation of the Mississippi river were "not intended to abridge the power of the local governments to construct levees and dikes to confine the waters within its proper channel, to reclaim overflowed land, to construct wharves and streets upon its banks, whereby the very use of navigation for which it is preserved, may be the better enjoyed, nor do other acts proper in the exercise of governmental authority demanded by the interest of the people and the progress of the country, and not calculated to hinder the free navigation of the river. * * * The river may be at a certain point of sufficient depth for navigation from one shore to the other. Yet at that point the interests of navigation may demand that a wharf be built into the river, for a given distance, without obstructing the free use of the river for vessels. Can it be claimed that a riparian owner, whose land is thus practically deprived of the advantages of being upon the river bank, may claim relief on the ground that the navigation of the river is affected? Clearly not."

The town of Keokuk was platted before the decree of partition was made, and before the trust deeds to Mason,

and to Marsh, Lee & Delavan were made. Those mortgages conveyed specified lots, with definite bounds, and did not profess in terms to convey to the lot owners any riparian rights. In this connection we cite,

Bailey, Trustee, et al. vs. Burgess, et al. Legal News, Oct. 14, 1876, p. 28.

The Supreme Court of Rhode Island held in that case:

"The property sought to be sold for reinvestment is certain real estate lying on the east bank of the Seekonk river, it was platted into lots before the deed of trust was made, and the deed of trust conveys the lots as platted. Some of these lots lie partly upon the upland and partly upon the shore, and some extend over the shore beyond low water mark, but all of them as platted are defined by a definite line as their western boundary, outside of which there are no lots platted below high water mark. Since the plats and deed were made, a harbor line has been established by the general assembly, running outside of said lots and in front of them, and the bill alleges that doubts have arisen as to whom the land between the water line or westerly line of said lots and the harbor line now belongs, and whether or not it forms a part of the trust estate.

"In this state, at common law, the fee of the soil in tide waters below high water mark is in the state. It is true the riparian proprietor may fill out in front of his land, but, if he does so, he does so by the permission or acquiescence of the state, the establishment of a harbor line being at the least equivalent to such a permission expressly given. Indeed, the harbor line act referred to in this case does in so many words recognize the right to fill out to the line.

When therefore Tristam Burgess, previous to the establishment of a harbor line, conveyed lots which extend to or below high water mark, he left nothing in front of the lots so conveyed which belonged to him or which his heirs could inherit from him, the fee of the soil in front of the lots being in the state. The fact that the lots are defined by strict boundary lines is of no consequence; for if the grantee fills out in front of them, he will do so not under the deed, but by virtue of his riparian ownership, and he will take the land so filled not from Tristam Burgess or his heirs or devisees, but from the state. If, however, any part of the western line of the lots does not extend to high water mark, but leaves a strip or margin between it and high water mark, such strip or margin, having never been conveyed to the trustee, belongs to the heirs or devisees of Tristam Burgess, and they, not the trustee, are entitled, by virtue of their riparian ownership, to fill out to the harbor line."

Also see *Attorney General vs. Terry*, 9 Moak, 523.

In plaintiff's case, he bought after the state had granted the city of Keokuk exclusive control of the shore for levee purposes, and prohibited him from exercising any right to fill out. He takes nothing by his deed, and nothing by grant from the state.

These decisions rule out the claim of plaintiff for any damages in this action.

1st. He has no title to the made land.

2d. He has neither possession, nor is entitled to the use of it.

3d. The structures complained of are lawful or unlaw-

ful. If lawful, he cannot interfere until the city has vacated the street. If unlawful they constitute purpresture, which he has no right to recover damages for, nor to make its continuance a source of profit.

4th. The Schurmeir case so far as it touches the question of damages, is entirely different from plaintiff's claim. That decision held that neither the city nor the state could "convey to the respondents any right to disregard the trust or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant." This ruling is based on the principle that the state must use its property so as not to injure the adjoining property of another; but it does not deny the right to use public property for public uses, without condemnation, especially as in the present case no damage is done to the land of the plaintiff, nor to any business conducted thereon.

But counsel for plaintiff argue that the case of *Schurmeir vs. Railroad*, 7 Wall., 282, is decisive of this case.

The decisions in Iowa are in general accord with the decision in *Schurmeir vs. R. R. Co.*, 7 Wall., 282.

That case was originally commenced not to test the effect of a dedication, but to enjoin the railroad company from destroying the warehouse business of the plaintiff. The railroad company claimed the fee of the soil as a grantee of the United States, and denied that the plaintiff had any right or title to the made land, the river bank, or the street in question, claiming that under a second survey it had acquired the fee to the land in controversy.

The case was commenced in the State Court, and because

it involved the construction of a statute of the United States, was taken to this court. As reported in 10 Minn., 82, the State Court held:

1. That the river was navigable in fact, but not in law; and the law applicable to tide water did not apply; that if Schurmeir's grantor did not take the fee to the center of the river, he did to low water mark. On this point the decision was overruled in this court, and the doctrine of the Iowa Supreme Court sustained.

2. It was held that the river, and not the meander lines of the surveyor, bounded Schurmeir's lots on the river side. This was affirmed in the United States Supreme Court, and was decisive against the claim of the railroad company to the land, and vested the fee in Schurmeir, unless it had been divested by a statutory dedication.

3. It was further held by the state court, that the city did not take the fee of the street, by virtue of a complete statutory dedication, but simply an easement, for street purposes, and not for railroad purposes. This was not directly passed upon, this court holding that even if the fee vested in the city, it had no power to permit the street to be used by the railroad company for "any purpose which would render valueless the adjoining property of the plaintiff." (7 Wall., 290.)

4. The State Court held that, under the facts, the use of the street by the railroad company obstructed the warehouse business of the plaintiff, and it could be enjoined. This was affirmed.

This decision might authorize Barney to enjoin the

railroad companies from obstructing Water street, if he could show, as Schurmeir did, any special damages. He can show none. He does not show that he has any warehouse on his lots, or that their rental value has been diminished on account of railroad tracks in the street, or railroad or packet depots on the levee, for the very good reason that they have no intrinsic value.

The case of *Haight vs. City of Keokuk*, 4 Iowa, 205, is claimed by plaintiff to be conclusive against the defendants. Haight petitioned for an injunction against the city of Keokuk, to prevent the collection of wharfage dues for the use of his wharf, which was located below high water mark, in front of lots four, five and six, in block six. In that case the question of title was necessarily put in issue; as it involved the police right of the city to collect wharf fees. Incidentally the question of the fee of the soil in the river bed, below high water mark, was referred to. The Supreme Court, on the facts as presented, found that Haight was not the owner of the *locus in quo*, and denied the injunction. The judgment of the court was right, whatever there may be in the opinion that is *obiter dicta*. Haight claimed by the partition decree he owned to the middle of the river. The city denied it; and the court decided he had no title.

A stronger case involving the same question of police power, was decided in

Sayers, et al. vs. The City of Lyons, 10 Iowa, 256.

The state had granted the grantor of Sayers the right to build a warehouse on Water street, and mostly below high water mark. The town was laid out in 1840, the grant to build the warehouse was made in 1846, and the city in 1855 was granted exclusive control over the public

landing. The court held that the plaintiff was not entitled to an injunction because he did not build within the grant; that a call from a corner of a lot was definite, and fixed the limits of the grant; that, in addition, he had no right to maintain the warehouse after the City of Lyons was granted exclusive control of the landings, and its removal could not be enjoined.

The opinion in the Haight case, so far as it affects the Garland plat, is *obiter dicta*, because the facts agreed to for the purposes of that case, did not show that Galland had any authority to make the plat, or was in any sense the owner of the soil. The parties and issues were different, and are not conclusive on that point, or in regard to the ownership of the fee of the streets of Keokuk.

I.

Had the Railroad Companies the Right to Lay their Tracks upon Water Street, without Compensation to the Adjoining Lot Owners?

The plaintiff denies the right, on the ground that the track of a railroad is an additional burden, not contemplated in the original dedication. This is not true of those cities where the fee is in the corporation. Nor in principle is it true, of streets where the fee is in the adjoining lot-owner, and the use in the public. The use of the street is in the public, no matter who holds the fee, and if a railroad is an improved highway, it is within the scope of public purposes. In Iowa the lot owner has no right to use the street except in common with the public. The city has the use to the line of the abutting lots, and is responsible for the condition of the sidewalks, because they are under its

control as part of the streets. It can use the entire surface of the street, pave, curb, gutter, build sewers, lay water and gas pipes, permit the erection of telegraph poles, and permit the construction of horse railways, whether it owns the fee or not, without compensation to the adjoining owner. The running of a railway car, whether propelled by horse or steam power, is not an unlawful burden upon the soil, for it is not a permanent obstruction of the street. The track itself, when laid down by the railroad companies, under the direction of the proper authorities, properly planked or paved, so as not to materially obstruct the passage of persons and vehicles over it, is not a burden for which compensation should be paid. If it was so considered, then cities having the fee of streets, would be entitled to compensation for laying such tracks, without their consent, in the streets. But as held in Iowa, no such right accrues to them. They hold the naked title, but for public use. So with the abutting lot owner, in case of a common-law dedication. The use of a street for railway tracks makes no change in the title; only a license or an easement is secured, and that easement is as to the owner no more a nuisance, or a purpresture, than the laying of gas pipes, or building of sewers.

The State of Iowa, by statute, has given railways the right to use public lands, to run upon and across highways, and streams, and has subjected lands used for public purposes to the easement of railway tracks. In such cases there is no change of the fee. In condemnation there is. The owner of the lands is divested of it, and the public or the state takes the fee for public use. We insist, therefore, that individuals can claim no right to compensation for the use of the street, where the state or municipality can claim

none. If he is specially damaged, he can sue for such damages, but for no other.

"Although plaintiffs, as owners of a lot abutting on a public street may have such an incorporeal interest or right in the street as will enable them to enjoin a diversion of it to uses and purposes foreign to, and inconsistent with, the objects for which the street was granted to the city, (*Cook vs. City of Burlington, Supra.*), yet it does not follow that, therefore, they may maintain an action for damages for an obstruction which does not affect them differently from the public generally."

Ingram et al. vs. the C. D. & M. R. R. Co., 38 Iowa, 675.

In condemnation proceedings in Iowa, no recovery can be had for the occupancy of a public highway for railway purposes, where the dedication was by user for ten years, on the ground that "the right of a railway company to lay its track over and along a highway was given by express statute, as has been held by this court in *Milburn et al. vs. the City of Cedar Rapids et al.*, 12 Iowa, 246, and other cases following it. * * * If the way was but a private road, the damages resulting from its occupancy might be recovered."

Gear vs. The C. C. & D. M. R. Co., 39 Iowa, 25.

These decisions are in harmony with the later decisions in other states. See

Cosby vs. Owensboro & Russellville R. R. Co., 10 *Bush*, 291.

Under the decisions made prior to this railway age,

the laying of railway tracks would have been held to be a use of the street never intended by the dedicator. But the same might be said of the use of streets for gas and water pipes. The owner must be held, when he dedicates land for streets, to include not only known uses, but all possible uses which the legislature may authorize. This is the tenor of modern decisions.

In a late case, where the dedication was common law only, and the public had had the use of the highway for fifty years, the Supreme Court of New York held that a monument with a base fifty feet square, might be erected in the highway.

"The streets in a populous city or village may be appropriated to other purposes than a mere place of passage; they may be used and appropriated for the promotion of the health, trade, commerce and convenience of the public, and, it may be added, for any public use which is consistent and in harmony with their use as public highways."

Tompkins vs. Hodgson et al., 2 Hun., 148.

To the same effect are

Warren vs. Grand Haven, 30 Mich., 28;
C. R. I. & P. R. R. Co. vs. City of Joliet, 2 West. Jurist, 670.

In the case last quoted it is held that it makes no difference whether the fee of the street is vested in the public or only the use.

In the case at bar, it is admitted by the plaintiff that there is a dedication of Water street. Counsel for plaintiff,

in denying the right of the city to authorize packet or railroad depots on the levee, says: "Let it be remembered that the dedication of this ground is in writing, is express, and is for street purposes," p. 40.

In the case of *The Chicago, Rock Island & Pacific R. R. Co. vs. City of Joliet*, 2 West. Jurist, p. 667, where it is sought to enjoin the railroad company from crossing the public square, the Supreme Court of Illinois held that the use was proper; that: "It must be admitted that there was here a common-law dedication. The difference between a statutory and a common law dedication is, that the one vests the legal title to the ground set apart for public purposes in the municipal corporation in trust for the public, while the other leaves the legal title in the original owner, charged, however, with the same rights and interests in the public which it would have if the fee was in the corporation. The rights of the public are not affected by the question." *Manley vs. Gibson*, 13 Ill., 308.

To the objection that the public grounds had been diverted to a use which was inconsistent with the dedication, the Court held:

"But it is the settled doctrine that the appropriation of property to the construction or use of a railway for the transportation of persons or property, is an application of such property to the use of the public. * * * The corporation itself is private, has its private rights, still its uses are public. The railroad use is not a private use, but a use for a public purpose; the use of the road being free and common to the whole public upon the same conditions."

This Court has also recognized the public character of railways in

Rogers vs. Burlington, 3 Wall., 614.

St. Joseph Township vs. Rogers, 16 Wall., 663.

Olcott vs. Supervisors, 16 Wall., 690.

Township of Pine Grove vs. Talcott, 19 Wall., 677.

If railroads are not considered in the light of improved highways, they could not be authorized by state or national legislation to bridge navigable streams or run along them on an embankment or piling because they would obstruct public highways. The modern rule, and the rule of this court is that one use of a public highway must yield to another use demanded by the necessities of trade and commerce. The right to change channels, and to close them by permanent structures has been sustained by a decision rendered by this court at this term, in

The State of South Carolina vs. the State of Georgia et al.

II.

The second error assigned by plaintiff is that the court erred in holding that Water street, in the City of Keokuk, was dedicated for levee and wharf purposes.

It is argued that it was dedicated solely for street purposes, and for that reason no wharf can be erected on the street. We admit Water street was designated on each plat in evidence as a street; and the erection of a wharf by public authority or permission, is as legitimate a use of the street as it is of a navigable river. Both are public highways; and if the limits of a river may be

abridged by piers, docks and wharves, so as not unnecessarily to interfere with navigation, a street may be used in part for permanent structures in aid of commerce, so as not to unnecessarily obstruct passage over it.

But, as a matter of fact, Water street in front of plaintiff's lots had a defined boundary of one hundred and forty-two feet in width at the time the several plats were made. When definite measurements are given, they limit the width of the street. While the proprietors of Keokuk could not extend Water street below high water mark, they did provide that it should extend to that line, and designated the boundary by a meandered line from points measured from the lower corners of block four and block three, which shows a width of one hundred and forty-two feet in front of plaintiff's lots. The corners of the lots in question are fixed monuments.

Sayers et al. vs. Lyons, 10 Iowa, 255.

Beyond that line no owner of the half-breed tract had any claim. Hence, any use by the city, of the levee, was dependent on the grant of the state, and not of the lot-owners fronting on the river.

The court erred, as we claim, in holding that the made land became appurtenant to the street, and held under the same title and for the same uses. The title still remains in the state, and the use is granted to the city. The title to the street is in the city, and subject to all legitimate public uses.

III.

The third and fourth assignments of error by plaintiff are that the erection and maintenance of the packet depot building is unlawful, and unreasonable.

The city might have erected the building itself, and leased it for the very purposes for which it is now used.

In *Grant vs. the City of Davenport*, 36 Iowa, 406, it is held that the city can grant to a water works company the right to construct water works and supply the citizens with water, and that it would not be good law to hold the contract invalid because the city could not make the same contract with every other citizen or company. Also, that no private citizen had a right of action to test that question; that only some person or company claiming the right to lay down water pipes in the streets could contest the validity of the exclusive franchise. The same principle is reaffirmed in regard to a contract for the right of way over a public bridge in the city of Des Moines, holding that the city was bound by its original contract, and could not impose new terms, after the railroad company had accepted the original contract, and expended money in accordance with it. It accords with the ruling of this court in

Chicago vs. Sheldon, 9 Wall., 55.

IV.

The court found as its conclusions of law:

"1. There was no complete statutory dedication of Water street under the town plat act of 1839, prior to the decree of partition for the reason among others, that all of the proprietors, *i.e.*, the half-breed owners and their grantees did not join in making a plat, or in selling lots, according to the Galland or other plats; what was done prior to the decree was at most a common law dedication by those who platted or recognized the plat, and it was, therefore, com-

petent for the decree to provide, as it did, that the lots on "Water street should include all the land in front of the lots to the Mississippi river."

There was as complete a statutory dedication of the town of Keokuk, as there was a common law dedication, prior to the partition decree. While at common law the assent of the owner of the land to the dedication is absolutely essential to the validity of the dedication, under the statute of 1839, the town might be laid out by county commissioners or other person or persons, and the recording of the plat conveyed the title of the proprietors to public grounds to the public. We have shown that in 1840, Galland, who was a partner in the New York Company, who, as agent, had laid off the town and sold lots for the company, who as trustee held the legal title to the interests of the New York Company in this town plat, procured a true survey of the town, acknowledged and filed the same for record, and as the recorder certifies, had the same recorded in November, 1840. This plat is the only complete plat of the city, which on its face conforms to the satute, and has the recorder's certificate of record endorsed upon it; and is, undoubtedly, "the plat of said town now on record in the Recorder's office of said county," which is recited by the legislature of Iowa in the first section of the Act to incorporate the City of Keokuk, passed December 13, 1848.

The plat is valid to convey the title of all persons represented by Galland, and for whom he acted. He had been the active agent of the partnership in purchasing the half-breed interests for the New York Company, he had sold lots in the town, and had purchased lots, from the New York Company, and from Spalding and other co-tenants of

the New York Company. The law required the plat to be recorded before any lots were sold, and imposed a penalty on the persons laying out the town, for selling lots before the recording of the plat. In acknowledging and recording the plat he complied with a statutory duty imposed upon himself and his co-trustees.

The plat is valid as against the trustees of the New York Company, and therefore valid as against plaintiff.

This plat was recognized and adopted by the commissioners, so far as the location and names of the streets, and the number and location of the blocks, and the limits of the city are concerned. It was on record at that time, while the partition plat has never been recorded in the recorder's office of Lee county. The recorded plat of Galland instead of the partition plat, was that recognized by the legislature. The fact that the plat cannot now be found of record in the recorder's office cannot impeach the verity of the statement of the recorder that the original plat was recorded in November, 1840. The plat has the endorsement of Galland, or by his authority, that it was presented to the city of Keokuk, as one of its muniments of title, and has been preserved as such.

The court did not have before it the right to determine the fee of Water street as an entirety, but the fee of Water street in front of plaintiff's lots, and as he derived title from Galland, who was one of the real parties in the partition suit, one of the partners in the New York Company, one of the five trustees represented by Marsh, Lee & Delavan, he is estopped by the plat. The fee of this portion of Water street is in the city of Keokuk,

and under color of title, it has held possession, adversely to plaintiff's grantors, for twenty-five years.

The court erred in giving judgment for plaintiff, as under the Iowa statute, he had no right to bring the action. Under the code of Iowa, "Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by an action," &c.

Code of Iowa, 1873, Sec. 3246.

Plaintiff must recover on the strength of his own title.

Ibid, Sec. 3247.

Under the code of Iowa, therefore, in order to maintain ejectment, the plaintiff must:

1st. Have an interest in the real estate in question.

2d. He must be entitled to the immediate possession.

Unless the plaintiff has a legal subsisting interest in real estate, he cannot recover in any event.

In this case, therefore, in order for the plaintiff to recover he must show that he is interested in all the ground lying between the front of lots 5 and 6, in block 3, and the Mississippi River, and that his title thereto is stronger than the title of defendants. He must also show that he is entitled to the immediate possession of the premises.

The plaintiff in ejectment cannot recover unless he shows himself entitled to the possession at the time of bringing suit.

Wood vs. Morton, 11 Ill., 547.

Batterton vs. Yokum, 17 Ill., 228.

Hence, setting up another right as a homestead right, defeats ejectment.

Conner vs. Nichols, 31 Ill., 148;

Smith vs. Miller, 31 Ill., 158;

Trask vs. Baxter, 48 Ill., 406.

"The action is ejectment, and in order to entitle the plaintiff to recover, he must have a right to immediate possession. Whatever takes away that right constitutes a legal defense."

Cincinnati vs. Lessees of White, 6 Peters, 431.

Hunter vs. Trustees of Sandy Hill, 6 Hill, 411.

Cosby vs. Owensboro & Russellville R. R. Co., 10 Bush, 294.

Where a vendee of land plats a town, and afterwards forfeits his title, although the plat is irregular, in not complying with the statute, so as to effect a statutory dedication, and fails to convey title in full to the public, his vendor and subsequent purchasers who recognize the plat by suits or by conveyances, are estopped to deny the conveyance of a public landing to the public by the terms of the plat. Held that the landing was dedicated to the public, and subsequent purchasers took no title to it. That the plat was the clear and unmistakable act of the party showing an intent to dedicate the streets, alleys and landing to the public.

Field vs. Carr et al., 59 Ill., 201.

In our case the exclusive title of the New York Company, to this portion of Water street, was perfected and the plat became a warranty, against the company, who conveyed to subsequent purchasers no title to the streets, so far as they are included in the shares drawn by them.

Where the plat of a town left vacant spaces each side of the right of way, but no use was marked on the plat, nor stated in the certificate, and the trustee, who held the legal title did not sign the certificate to the plat, and the attorney in fact who signed the plat did not acknowledge it, held that sixteen years' acquiescence in the plat, and use of the ground for railroad and public uses proved a dedication.

Smith et al. vs. Town of Flora, 64 Ill., 95–96.

It is found by the Court below, in its fourth finding, that in 1837, Isaac Galland conveyed all the shares or interests he owned to the trustees of the New York Company. "That afterwards certain other conveyances of half-breed interests were made personally to Galland before the decree of partition, all of which were held to be owned by the New York Company, in the decree of partition." The decree of partition thus recognized Galland as the authorized agent of the company, to buy lands for the company, and to act for it up to the date of the decree, in October, 1841. The Court did not find the number of shares until the decree was made, on the 8th day of May, A. D., 1841, and then commissioners were appointed to divide the tract. The commissioners did not lay off the town; they accepted the plat of Galland, in all essential particulars, so far as the face of the plat is concerned. They do not state that they employed a surveyor to survey the town of Keokuk, but that the plat is one, "the outlines of which were designated and marked by Jenifer T. Sprigg, in his survey as town reservation. *

* Water street is of unequal and irregular widths at the points where the dotted lines pass across the same, the street is of the width in feet as is represented by the figures set on said lines.

"Water street extends the whole front on river side of the town, or from the intersection of Orleans street with the Mississippi, down the right bank of the river with the meanders thereof to the intersection of Cedar street with the Mississippi river.

"Lots (5) five, (6) six, of block (3) three, are fifty feet wide by one hundred feet long.

This is what the plat shows, and it is a ratification of the plat of Galland, in all essential particulars. The same rule applies to this plat, which was applied to the Galland plat by the Supreme Court of Iowa in *Haight vs. City of Keokuk*, 4 Iowa, 210. The face of the plat governs. Land marked "Water street" is a street to all intents and purposes, and the law defines the legal effect of the grant. To the same effect is *The City of DesMoines vs. Hall*, 24 Iowa, 237.

The report of the commissioners so far as it attempts to vacate the plat, by extending the limits of the lots fronting on Water street, was beyond their jurisdiction, void, and the confirmation is equally void.

The commissioners of partition were limited in their powers by the statute, had no authority to change a town plat or to vacate it, and so far as they attempted either in the case of *Spalding vs. Antaya*, their acts were void, and the confirmatory decree of the court did not validate them. This is the rule in regard to the location of roads, and is applicable to partition proceedings. See

State of Iowa vs. Molby, 18 Iowa, 528.

The trustees of the New York Company could not vacate the plat made by their authority, and extend the lots which they had platted as fifty by one hundred feet,

to extend the full width of Water street in addition. They could not authorize the commissioners to do what they were estopped by the statute from doing. They were bound by Galland's act in making the plat, in acknowledging it as trustee, and in recording the plat. They had held Galland out to the world as a trustee, having the right to act for them, and are estopped from denying the right of the public.

"Cases of dedication often rest upon the principle of *estoppel in pais*; it being considered fraudulent on the part of one dedicating his land to public uses to retract, to the prejudice of parties who have purchased on the faith of such dedication."

Wood vs. Seeley, 32 N. Y., 116;

To the same effect are:

Bullis vs. Noble, 36 Iowa, 620–1.

Morratt vs. Deihl, 37 Iowa, 252.

When Barney seeks to controvert the validity of the Galland plat recorded in 1840, on the ground that Galland had no authority to make it, and to avoid the estoppel alleged against him, he encounters two well-known principles of law: "The first of these principles is, that when a party procures or even acquiesces in the disposition of his property by another, under color of title, and pretending to title, he shall be bound by such disposition, and shall be presumed to know the law, so far as it is applicable to the case. The other is that even if he shows that he was really ignorant of the law, and acted in that ignorance, still the maxim, *ignorantia legis neminem excusat*, will apply in favor of the other party. 'Equity and policy equally dictate,' says Chancellor Kent, 'that he, and not the purchaser, ought to

suffer. His ignorance of the law ought not to protect him from the operation of the rule of equity. If he may be allowed to plead his voluntary ignorance in destruction of equitable rights growing out of his own acts and assertions, the grossest impositions and the greatest frauds might be practiced with impunity.

Tilton vs. Nilson, 27 Barb., 605.

"The principle is too well settled to require the citation of authority that one cannot stand by in silence when he knows that another is acting upon an erroneous state of facts, and thereafter claim the benefit of the correct state of facts, if such claim will tend to the injury of the other person. Much more is the rule just in a case where, by his silence, he derives an immediate and direct advantage over the injured party. His silence then becomes deceit and fraud. The suppression of the truth in such a case has the same effect, and is equally culpable with the assertion of a falsehood."

Erie Co. Savings Bank vs. Roof, et al., 48 N. Y., 298.

THE REMEDY.

The complainant has no remedy at law for the use of public grounds, in the nature of ejectment. He is not entitled to the beneficial use of the street or to the possession, except for purposes of passage. The plaintiff has no right to complain of the appropriation of the bed of a navigable stream, while the state officers make no objection to it, and he has no right to an injunction or damages occasioned by the use of the bed, unless he has sustained some special damage.

Fort Plain Bridge Co. vs. Smith, 30 N. Y., 47.

To the same effect are

Prince vs. McCoy et al., 40 Iowa, 533;

Ellsworth vs. Chickasaw Co., Ibid, 571;

Ingram, Kennedy & Day vs. the C. D. & M. R. R. Co., 38 Iowa, 675.

As a matter of fact this court must decide whether it will subject the city of Keokuk to the loss of its landing, and to a prohibition of the use of its streets for railway purposes, at the demand of a lot-owner who has worthless and unimproved lots which are likely to remain so, and who has suffered, and can suffer, no loss except in common with his fellow citizens. It must decide whether private interests shall override the public good, and the steamboat and railway interests be compelled to pay tribute to the plaintiff, who seeks to enforce a stale claim. He asks this Court to shut its eyes to the progress of the last century, to the liberal and broad views of municipal needs and municipal power which have created and kept pace with this progress, and to accept the narrow dogmas which were born in king craft, and fostered for the protection of royalty and the recipients of royal favor. We ask the Court to adopt and enforce the principles of general jurisprudence, which are consonant with the progress of the times, and preserve public rights as well as the rights of the individual.

R. G. INGERSOLL,

Att'y for Toledo, Peoria and Warsaw Railway Co.